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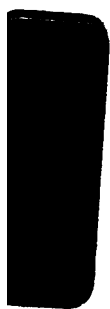
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AN ESSAY

ON THE

RIGHTS OF THE CROWN

AND THE

PRIVILEGES OF THE SUBJECT

IN THE

SEA-SHORES OF THE REALM;

COMPILED FROM THE

TEXT WRITERS AND DECIDED CASES:

BY

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INTRODUCTION.

THE following Essay is published with no other pretensions than as collecting, from the Text-writers and decided Cases, the principal points of law upon the subject; with a commentary upon such of them as would seem to have been rather loosely laid down by the authorities. It is a subject which, as matter of dispute or discussion, does not, from the nature of things, often come before the Courts of Westminster for judicial decision; (although it has, of late, been more frequently canvassed than usual;) it is, however, a topic by no means unimportant or uninteresting, as affecting both public and private rights. It is remarkable, that the principal authority, generally quoted and relied upon, is the Treatise *de Jure Maris*, published, some time ago, by Mr. Hargrave, in a collection of Law Tracts, from a MS. ascribed by him, upon apparently sufficient grounds, to Lord Hale. Even this authority is comprised in the prelimi-

nary chapter of that Treatise, the principal design of which regarded the Ports and Customs. How far the work was considered, by Lord Hale himself, as sufficiently revised for publication, does not appear. It is, no doubt, a valuable present to the Profession; and in deference to its generally admitted authority, the Treatise in question has been made the basis of the following Essay.

*Lincoln's Inn, 8, New Square,
January 16, 1830.*

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CITED OR INTRODUCED.

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CORRIGENDA.

- Page 2, note 3, *for* 17, 18, *read* 39, 41.
 — note 4, *for* ch. 2, *read* ch. 22 and 24.
 13, note, last line, col. 2, *for* 1 Boss. *read* 2 Boss.
 14, note, line, 2, col. 1. *for* 5 Jac. & Walk. *read* Barn. & Ald.
 — — last line col. 2. *for* 31, *read* 55.
 22, line 18, *for* inheritances *read* substances.
 41, line 1, *for* tion of titles, *read* tions of title.
 45, line 8, *dele* comma *after* attributed.
 — — 12, *dele* comma *after* exclusively.
 — — 15, *alter* semicolon *into* a comma.
 49, note, col. 2, line 1, *for* see Mod. *read* 1 Mod.
 61, line 3, *for* grantee *read* grantor.
 71, line 14, *for* generali *read* *lis*.
 78, line 19, *for* otherwise as, *read* otherwise than as.
 85, line 8, *insert* by *before* wears.
 117, note 9, *for* Jac. & Walk. *read* Barn. & Ald.
 149, side note, *dele* overflown.
 152, side note, *for* entitle derelict, *read* entitle to derelict.
 157, line 16, *for* *apprendre*, *read* *à-prendre*.

AN ESSAY
ON THE
RIGHTS OF THE CROWN
IN THE
SEA-SHORES OF THE REALM, &c.

Of the King's Title to the British Seas.

THE British Seas, sometimes called the Four The British seas, and the king's title therein. Seas, are those which encompass the coasts of England, Scotland, and Ireland. To the west they not only include the sea between Great Britain and Ireland, but extend over the Atlantic Ocean, which washes the western coasts of Ireland: this western part of our sea is subdivided; for, so much as runs between England and Ireland is called St. George's Channel, or the Irish Sea; and the sea on the west coast of Scotland is sometimes named the Caledonian, Deucalionian, or Scottish Sea, and sometimes the North Sea. To the east we have the German ocean, which is bounded principally by the opposite coasts of Germany, and the United Provinces, (now Belgium);—lastly,

to the south there is the British channel, or sea, which runs along the French coast, and, comprehending the Bay of Biscay, ends with the northern coast of Spain.¹

Over the British seas the King of England claims an absolute dominion and ownership, as Lord Paramount, against all the world. Whatever opinions foreign nations may entertain in regard to the validity of such claim, yet the subjects of the King of England do, by the common law of the realm, acknowledge and declare it to be his ancient and indisputable right.²

This dominion and ownership over the British seas, vested by our law in the King, is not confined to the mere usufruct of the water, and the maritime jurisdiction, but it includes the very *fundum* or soil at the bottom of the sea. "The sea is the King's proper inheritance,"³ and he is "Lord of the Great Waste," both land and water; "*tam aquæ quam soli.*" Selden,⁴ in his celebrated treatise on the Dominion of the Seas, would seem to contemplate this

The king's title to the British seas, includes both the sea and the land covered by it.

¹ Hargrave's notes to Co. Litt. 107, b. being a summary of the 1 Ch. 2d Book of Mr. Selden's Mare Clausum.

² 1 Roll. 5. Lib. 15. 2. 168 and 170. Lib. 42 and 45. 3 Leo. 75. Co. Litt. 107 and 260. b. Callis 17. 2 Molloy 375. Black. Com.

264. Hale De Jure Maris, 11 and 18. and see the cases cited p. 13, and 45 post on the Fisheries, which admit this to be settled law.

³ Dav. Rep. 57. Callis on Sewers, 17, 18.

⁴ Mare Clausum, Lib. 2. Ch. 2.

ownership of the King, as combining both jurisdiction and ownership; the one, indeed, would seem to involve the other, if Selden's doctrine to its full extent be admitted.

There are eminent writers upon natural and upon national law, who have controverted Selden's doctrines, and have denied the King of England's exclusive dominion, and consequently his ownership over the British seas; but however this may be, and probably will ever continue, *vexata quæstio* between such writers, we know that the writers on the common and municipal law of England, as well as the decisions of our judicial courts, all speak the same language, and appropriate the dominion of the British seas *tam aquæ, quam soli*, to the King.

This dominion not only extends over the open seas, but also over all *creeks, arms of the sea, havens, ports, and tide-rivers*, as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the *flux* and *reflux* of its tides, are part and parcel of the sea itself, and subject, in all respects, to the like ownership. This is abundantly proved by the cases hereinafter referred to,⁶ where the public *right of fishing* in the creeks, arms of the sea, havens, ports, tide-rivers, &c. of the

It includes all creeks and arms of the sea, and tide-rivers, as far as in the reach of the tides.

⁶ See p. 45 post.

kingdom has been, in many instances, established upon the principle that they are *part of the sea*, and of the King's dominion, and as such, liable to the common law right of the subject to fish therein; of which right we shall, in a future page, take notice.

Lord Hale, in the treatise ascribed to him,⁷ aptly compares the King's property in the sea and tide-rivers, creeks, &c. to the ownership of lords of manors in the common or waste lands of the manor. The soil and freehold of the waste belong to the lord, but subject to certain rights of the manorial tenants; such as common of pasture, piscary, turbary, ways, &c., claimed and enjoyed by them, by the custom of the manor, in and out of such waste lands. So the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein, by the custom of the realm, which is the common law.

Nature of the king's title to the land under the sea.

The title of the King of England to the land or soil *aquâ maris cooperta*, is similar to his ancient title to all the *terra firma* in his dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged origi-

⁷ De Jure Maris 11.

nally to the King ; and, according to the feudal principles of our ancient laws of tenure, the land-owners of England are, to this day, *tenants* to the King, holding their lands of him, as their lord paramount.

That part of the land which the King and his ancestors have never granted out to the subject, remains to the King, as his *demesnes*, in absolute ownership.⁸ The *terra firma* of England has become, almost entirely, the property, (by grant and tenure,) of the subject ; but the *terra aquâ maris cooperta* still remains to the King in wide and barren ownership.⁹

Some rare and antique instances may, indeed, be found of actual grants, by Kings of England, of certain portions of land *under the sea*, i. e. of both sea and land, to a certain extent. These grants have been made in such places where some creek or bay has afforded the means of exclusive possession. Thus, the tract ascribed to Lord Hale, and before quoted, recites a grant of King Canute, “ de terrâ insulæ Thanet, tam in terrâ quam *in mari et littore* ;”¹ and another of William the First, “ Abbati Sancti Augustini de totâ terrâ Estanore, *et totum littus usque medietatem aquæ* ;” and the author of the tract adds, “ If the King will grant lands adjacent to the sea, together

Grants by the king, of portions of land sea-covered.

⁸ Madd. 202.

14, 28.

⁹ Hale de Jure. Maris p.

¹ De Jur. Maris, p. 18.

with a thousand acres of land covered by the sea adjoining, such grant will pass the soil itself; and if there should be a recess of the sea, leaving such a quantity of land dry, it will belong to the grantee.”²

Callis,³ in his book on Sewers, says, “I take “it, it is very *disputable* whether the grounds, “before they be relinquished by the sea, may “be gained by *charter* or *grant* from the “Crown; *I suppose they may.*” But if such grounds could not be gained by *charter* or *grant*, it would seem to follow that they could not be claimed by *prescription*; for nothing can be prescribed for, which could not have had a lawful beginning by grant: Callis, however, in the very same place, says, “A subject cannot “have the grounds to the *low* water-mark, “but by custom or *prescription* ;” and he adds, that “the subject *may* have the grounds “of the sea, to the *low* water-mark, and that “no *custom* can extend the ownership of the “subject *further.*”⁴ But he adduces no authority, and there seems no sufficient reason why prescription or custom should not give title, as well to a specific portion of sea, or of a creek or arm of the sea, as of the shore. The true question is, whether *prescription* or *custom* will give title to either. But of this more hereafter.

² Hale, p. 18.

³ Callis on Sewers, p. 53.

⁴ *ib.*

Having stated the law to be, that the king is absolute owner of the ground or soil under the surface of those seas which are within, or parcel of the British dominions ;—let us proceed to distinguish the lines drawn by the law, between the *terra firma*, the *sea-bottom*, and the *sea-shore*.

The waters of the sea, being liable to fluctuation, sometimes rise above and overflow the land, and at other times retire from and leave the land dry. These fluctuations of the waters are of two different characters ; they are either periodical and according to the regular course of natural causes and effects ; or, 2ndly, *extraordinary* fluctuations, such as happen irregularly and rarely. The periodical and regular fluctuations are called the *tides* ; and are thus distinguished from extraordinary *inundations*, and *floods*, as well as from sudden and unusual recessions or derelictions of the sea. The manner, extent, and permanency of these changes will be found to govern and determine the ownership of the soil affected ; and our inquiry, therefore, will be directed to ascertain how far these changes in the natural character of the *locus in quo*, will, in the consideration and judgment of law, alter or affect the pre-existing title.

Distinctions
between terra
firma, sea-bot-
tom, and sea-
shore.

Tides and in-
undations.

In legal, as well as common parlance and

- Sea-bottom. intendment, the *sea-bottom* is that soil which is "*semper aqua maris cooperta*," and never known to become dry by changes of the surface of the sea. But with regard to the "*terra firma*," or dry land, although, in common speech, it imports land wholly exempt from the action of any of the tides, yet it would seem, that the legal *terra firma* ranges down to the ordinary high-water mark. In the Roman law, the shore extended "*quatenus hybernus fluctus maximus excurrit*," a boundary line equivalent, as it would seem, to the limits of our high-spring tides. But, with us it has been long settled, that *that* portion only of the land adjacent to the sea, which is alternately covered and left dry by the *ordinary* flux and reflux of the tides is, in legal intendment, the *sea-shore*; although the word *shore* has often, in common parlance, a somewhat more extensive meaning,⁵ taking in all that extensive belt of waste ground or

⁵ Callis, p. 54 and 55, in his book on Sewers, makes a distinction between *coast* and *shore*: "*coast*," says he, "certainly contains both sea and banks;" but he tells us, that "*shore* at every full sea is covered by the waters." He also quotes the Gospel of St. Matthew, c. 13. v. 2, where our Saviour "went into a boat, and sat, and all the multitude stood on the *shore*;" and Callis thence learnedly

infers, "that the *shore* was the dry-land *quia* they '*stood t hereon*,' and was a great quantity of ground, for thereon stood a multitude; and it was near the brink of the water, because they heard Jesus speak unto them out of the ship,"—a mode of proving a legal argument, not so much followed now, as in the quaint times in which the learned reader on Sewers lived and argued. We may

strand of sand, shingles, and rock, which encircles the British Isles, liable to the action of *every kind* of tide, and of which a part, next the land, is seldom covered by the water, even at the *highest spring tides*. But, in fact, no more of this unreclaimed tract is, at law, *sea-shore*, than that portion which lies between the *high-water* and *low-water mark*, at *ordinary* tides.

The law takes notice of three kinds of ^{Tides, three kinds of.} tides :—⁶

1st. The high spring tides, which are the ^{High spring tides.} fluxes of the sea at those tides which happen at the two equinoctials.

2nd. The spring tides, which happen twice ^{Spring tides.} every month at the full and change of the moon.

3rd. The neap, or ordinary tides, which ^{Neap tides.} happen between the full and change of the moon, twice in the twenty-four hours.

In one book⁷ it is said, that the lands overflowed by spring tides are called *sea-greens*,

observe, however, that as it was a *lake*, without tides, on which Jesus embarked, it could not, properly, be said to have a “shore,” according to our legal understand-

ing of that term ; it had “*ripam*,” but not “*littus*.”

⁶ De Jure Maris, p. 25, 26.

⁷ Bell’s Scotch Law Dict.

and they have been *supposed* to be *inter regalia*, in England; but in Scotland they are private property.

As to the soil
subject to
spring tides.

In the marshy districts and fens, along the coasts of the sea, creeks, and tide rivers, the lands which are subject to the action of the *spring* tides, are of considerable extent and value, and by no means so barren and unprofitable as the ordinary sea-shore or strand. These marshes, indeed, are in many places “manoriable,” as lord Hale expresses it,—and the right to embank and enclose them against the effects of the high spring and spring tides, and reduce them to a completely cultivable state, is of no small importance to the lords of adjacent manors, and the owners of the adjacent *terra firma*. In Dyer 326, and 2 Roll. Abr. lib. 170, pl. 13, the following quotation is given, “22 lib. Ass. Ca. 93, *de alluvione, accrescentiâ et inundatione seu fluminis subito et extraordinarie per vehementes tempestates, et quando per naturales et ordinarios fluxus maximos (viz. spring tides) qui fiunt bis quolibet mense, differentia magna est.*”^s Here, it seems the *spring* tides, (*fluxus maximos*), are termed “*naturales et ordinarios*,” being the same terms as also used for the *neap* tides. They are “natural,” and periodical, but certainly not “ordinary,” compared with *neap* tides.

^s Dyer 326, Roll. Abr. 2, lib. 170, p. 13.

Callis, also, would seem, though incorrectly, to consider *spring* tides, as *ordinary* tides. "It is certain," says he, "that, at spring tides, the sea useth to overflow the marshes in Lincolnshire and Norfolk, and returneth again within a short space of time; these being *usual* and *annual*, be not accounted grounds gained from the sea; so, because the marshes and sands in Lincolnshire be overflowed every twelve hours, and then dry again, they are not accounted grounds left or gained from the sea, because the sea hath daily her recourse thereon."

But, if the *spring* tides are deemed *ordinary* tides, and the marshes subject to the spring tides are not accounted grounds gained from the sea, then such marshes might seem to be "*partes maris, et marisci*," and to belong to the king. Callis, however, does not expressly so state the law; and the inference afforded by the case in Dyer¹ as will appear by reference, is *contra*, and more in favour of the subject, and against the King's title; for the "*magna differentia*" there alluded to, is this; viz. that all sudden and unususal inundations, which totally deface all the land-marks, will convert such inundated land into sea-bottom and sea-shore, and, as *such*, it will belong to the King; but that the more regular and periodical inundations of the spring tides,

⁰ Callis on Sewers, p. 50.

¹ See last page.

Spring tides
not "or-
dinary" tides.

do not, by overflowing the lands, change their legal land-marks and ownership, nor, consequently, convert them, for the King's benefit, into sea-bottom or sea-shore; and if they are not sea, or sea-shore, they must be part of the *terra firma* adjoining. Relatively speaking, it would seem that the spring tides, though *periodical*, can scarcely be denominated "*ordinary*," when there are other tides which take place daily, and more regularly, viz. the *neap* tides. Besides, the land subject to spring tides, is, for the greater part of the year, dry land.

As to soil
subject to
high spring
and spring
tides.

Wherefore, as the authorities almost uniformly describe the "shore," as that which lies within the "*ordinary* flux and reflux of the tides," it would seem to be most correct to consider the soil which is subject to the "high spring tides," and the "spring tides" as part of the adjoining *terra firma*, and belonging to the same title; and that, when such tides have ceased to act, the soil returns to the owner of the adjoining land. "That this is law," says lord Hale,² "in regard to *high spring tides*, is admitted on all hands, but with regard to the *spring tides*, some hold that common right speaks for the subject; unless the King hath a prescription, or usage, to entitle the Crown; for this is not properly *littus maris*. And, therefore, it hath been held, that where the King makes his title to land, as *littus maris*, or *parcella*

² De Jure Maris 26.

“*littoris marini*, it is not sufficient for him to make it appear to be overflowed by spring tides of this kind; p. 8, Car. 1, in *Camerd*, Scacarii, in the case of Vanhaesdanke for lands in Norfolk; and so I have heard it was held p. 15 Car. B. R. Sir Edward Heron’s case, and Trin: 17 Car. 2, in the case of the lady Wansford for a town called the Cowes, in the Isle of Wight.” In p. 12, he says more decidedly, “the King’s title is only to lands that are usually overflowed at ordinary tides.” Upon the whole, it may be regarded as good law at this day, that the *terra firma*, and right of the subject, in respect of title and ownership, extends beyond the lines of the *high spring* tides and *spring tides*, and down to the edge of the high water mark of the *ordinary* or *neap* tides; and that the Scotch and English Law are, in this respect, the same.

Terra firma, includes land subject to high spring- and spring tides,

Below this ordinary high-water mark, down to the low-water mark, i. e. between the ordinary high and low-water marks, lies the *shore* or *littus maris*. This shore, throughout the coasts of England, as well of the sea, as of creeks and tide rivers, doth, *de jure communi*, belong to the King.³ In this respect, as matter

The shore, or littus,

Is the King’s.

³ See pages 2 and 45 for authorities; most of the cases relating to the king’s ownership of the sea, and to the rights of fishing, either expressly or impliedly admit the king’s ownership in the *shore*. See particularly the recent cases of *Bagott v. Orr*. 1. Boss: and Pul.

of title, it would seem to be part of the *fundum*, or sea-bottom, which, as before said, belongs also to the king. "Our Common law of England," says Callis,¹ "doth much surpass in reason either the Imperial or the Civil law, for (by our law) it is said *Rex habet proprietatem, sed populus habet usum ibidem necessarium.*"

Of the title which a subject or corporate body of subjects may have in a portion of sea-shore, or sea.

Title to any part of the shore must be proved and supported as inland titles are.

As all the land of England, whether *terra firma*, sea-shore, or sea-bottom, belonged originally, (according to our laws of tenure,) to the King; and as the ownership of a subject, in or over any part of it, could only be derived by *grant* from or through the King, it might seem to follow that every claim of the subject, or of a Corporate body of subjects, to any part of the sea-shore, or of the shores of tide-rivers, must be supported by precisely the *same* evidence of *title* as a claim to any inland estate, as against the King's *prima facie* title. Nor does it appear how the King's right and claim to the sea-shore, or shore of tide-rivers, or any part thereof, can be rebutted by any other kind of evidence than that which would be called for by our courts of law in a case of

472. *Blundell v. Catterall* 5 Jac. and Walk. 268. *Davy's Rep.* 55, and the *King v. Smith* and others *Dougl.* 441. as to the shore of tide rivers. See also the recent

cases of the *King v. Lord Yarborough*, 3 Barn and Cressw. 91 and *Scrutton v. Brown*, 4 Barn and Cressw. 485.

¹ Callis on Sewers, 31.

inland title. It is presumed that the *sea-shore* is legally and technically speaking "*land*," as is the adjacent *terra firma*, in all cases of disputed title between the King and a subject, and between subject and subject.

The Kings of England have frequently, and from the most ancient times, exercised their right of ownership in the sea-shore, by making *grants* thereof to the subject, accompanying grants of the *terra firma* adjoining, and by similar forms of grant. Thus the King might grant a manor¹ "*cum littore maris adjacentē*," and the shore itself will pass, though *in gross*, and *not parcel of the manor*. He might also grant a manor, or land contiguous to the sea, *cum maritimis incrementis*, and that will pass the "*jus alluvionis*," i. e. land left by the retirement of the sea. Thus, King John granted to the Abbot de Bello Loco, "*alveum super quem Abbatia fundata est, a vado de Hartford cum fluctu maris in ascendendo et descendendo inter utramque ripam.*"² So William the First granted, "*Abbati sancti Augustini de toto terra Estanore et totum littus usque medietatem aquæ.*"³ Such also was the grant of Canute, quoted before;⁴ and the muniments of title to many manors on

Grants of the sea-shore by the king.

¹ De Jure Maris, 17.

² ib.

³ ib. 18.

⁴ Page 5 ante, and see also 4 Inst. for two other instances. Even Grotius admits that there *may* be pri-

vate ownership in some creek, or small part of the sea, or tide river, although he founds such ownership on "*primary occupation*." Grotius, Mare Lib. ch. 5 and 7.

The shore
may be made
the subject of
express grant.

the sea-coasts, will probably furnish similar *express* grants of the *littus*, or sea-shore, together with the manors themselves. In Sir Henry Constable's Case⁵ it is said, "that it was resolved by the whole Court that the soil on which the sea flows and ebbs,⁶ i. e. between the high-water mark and low-water mark, *may* be *parcel* of the manor of a subject." Indeed, there is no doubt but that a subject may be owner of a portion or tract of shore, by ancient *charter* or *grant* from the Crown.

The question
whether a
title to the
sea-shore can
be supported
by Prescription
considered.

But it is also laid down, in the tract ascribed to Lord Hale, as well as by Callis,—that a title to the *soil*, as well at the *bottom* of the sea, as upon the *sea-shore*, may be acquired and possessed by the subject by "*Prescription*." The doctrine of the Treatise is, that there are *two* ways by which a subject may acquire a right to such soil or shore; 1st. By the King's Charter or Grant. 2d. By *custom* or *prescription*.⁷ Callis,⁸ indeed, goes so far as to say that "a subject *cannot* have the "ground to the low-water mark, *but* by custom and prescription." But in this he is clearly wrong.

As the ownership claimed by a subject to

⁵ 5 Co. 107.

⁶ 2 Roll. 170., Dyer.
326., Scrutton v. Brown,
cited ante.

⁷ See p. 17. See p. 18,

⁸ Callis, Sewers 53.

any portion of the sea-shore is in opposition to, and in derogation of the King's *prima facie* title, it will be proper in this place to consider, with attention, the grounds upon which the King's subjects are supposed to found their titles to any part of the sea-shore when claimed by them against the King's ancient right and dominion. Neither good policy, nor public utility will, it is conceived, incline towards the claim of the individual subject; and it may be presumed that, the exclusive ownership of the sea-shore, or of any of the creeks, or arms of the sea, or of the ports or tide rivers, or any part of them, ought, whenever set up by a subject, to be regarded and construed *stricto jure*, —in favour of the Crown, *pro bono publico*.

It has already been premised, that the *terra firma* of England has become, almost entirely, transferred to and vested in the King's subjects, by grants from him. Without advertent to obsolete modes of tenure, and division of property, it will suffice to explain further that, as against the King, the subject holds his landed estate under two general denominations of title, according to the two most prevailing divisions of landed property, viz. into manors, which are tracts of freehold land, accompanied by peculiar rights and privileges; and naked freeholds, or freehold lands, unaccompanied by any such manorial rights and privileges.

Two principal kinds of tenures, manors and freeholds.

Copyholders are mere *tenants* of the lord of a manor.

As, however, claims set up to portions of the sea-shore, and to the shores of tide-rivers, are almost invariably made by *lords of manors*, in right of their manors, it will simplify our subject, and answer every useful purpose, if we discuss the question of right and title to the "shore," chiefly with reference to the ownership claimed therein by lords of adjacent manors.

As to the
claims of lords
of manors to
the sea-shore.

Grants.

We have already shown that any of the King's subjects, whether lords of manors, or not, may have a right and property in portions of the sea-shore, by ancient *express grant* from the King.⁸ With regard to claims founded on grants of manors, it need only be remarked, that the title to the "shore" will depend wholly upon the construction of the metes and bounds of the grant. Thus, if the boundary be expressed to be "down to the *sea*" or "bounded on one side by the *sea*," or any similar phrase, it is presumed the ordinary *high water mark* must be deemed the intended line, and not the low water mark, for the whole shore is "*quasi pars maris*;" or, as Bracton expresses it, "*quasi maris accessoria*."⁹ But, if the boundary line be ex-

⁸ P. 15, ante.

⁹ Lib. 1, cap. 2.

pressed to be "down to the low-water mark," or extend to any ascertainable line beyond low-water mark, this will be tantamount to a grant of the *sea-shore*. So, if the grant extend to any known and distinct limits within the sea, or tide river—as "usque filum aquæ," or "medietatem aquæ," &c. In fact, the land granted, whether situate upon the coast or inland, is co-extensive with the words of grant, and no more.

If a manor on the coast be granted by the same form of words as is used to grant an inland manor, nothing but *terra firma* would pass by such grant; no part of the "sea-shore" would be included in such grant. In a former page¹ we are told, that the King might grant a *manor*, "*cum littore maris adjacentē*," and the shore will pass, though in *gross*, and *not parcel of the manor*. So that it is evident a sea-coast manor does not *necessarily*, by reason of its locality, include the *shore* within the *precincts*.² Some grants of manors on the coast may include, *expressly*, not only the "*shore*," but also *wreck*, and *royal fish*, *flotsan*, &c., and a *separate fishery*; others may comprise the shore, but none of these liberties, profits, or franchises; and others may con-

A manor on the sea-coast does not necessarily include the shore.

¹ P. 15, ante.

² Non a nudā terrarum quæ oceano pulsantur occupatione, sed ab ipso maris usu ejusmodi privato; Seld.

lib. 2, cap. 2.; i. e. the absolute private use of it for all purposes, and not one, or two only,—and that excluding all other persons.

tain all these, or one of these privileges only, and no grant of the shore at all.

In like manner as it does not necessarily include the regalia of wreck, royal fish, &c.

It is agreed on all hands that *wreck*, or *royal fish*, are (under the technical denomination of *franchises*) *separate and peculiar species of property*, in the hands of subjects, and distinct from the property of the soil. If, therefore, one species of property be expressly granted, and another kind clearly omitted, it would seem to be contrary to the ordinary and acknowledged rules of construction to *presume*, or infer, a grant of that *one* which is omitted, *unless* it be *so* essential to the enjoyment of the *other*, as to render the implication or inference, in common sense, *necessary*. It is equally agreed, on all hands, that one man may have the soil of the shore;—another man the franchise of wreck;—another the liberty, or profit *à prendre* of a private fishery, &c., and all this may be upon the same line of coast, and on the same spot of shore. “The property in such land” [the shore], “is *prima facie* in the Crown. It *may*, “however, be in a subject; and *different* “rights, in that description of property, may “be vested in a subject, *according to the* “*terms of grant*. The King may have granted “to a subject the soil itself, or the privilege “of fishing, &c.” *Per*, Bayley, J. in *Scratton v. Brown*. 4 Barn. and Cres. 485.

These rights and titles, therefore, it would seem, are not, in respect of their subject matter, dependent upon each other, or necessarily linked together. The grant of the *sea-shore* down to low-water mark, is one thing; and the grant of *wreck* is *another* thing; nor does it appear ever to have been established that the possession of the franchises of Wreck, or of Royal Fish, by an express grant, *totidem verbis*, conferred also a title to the shore itself. The rule, "*expressum facit cessare tacitum*," applies as strongly to such form of grant, as to any other form.

Neither is it necessary to the full enjoyment of all, or any of these grants of *wreck*, *separalis piscariæ*, &c., that the soil of the shore should accompany them; it is clear that the King, or a subject under him, may retain the soil, subject and without prejudice to such usufructuary rights, vested in some other individual. It would seem, therefore, too much to contend that an express grant of any one, or more of these "franchises," will, *per se*, carry the soil of the "sea-shore;" and it should be remembered, that the King's grants to a subject are, by the rule of law, to be construed strictly, and in the King's favour, and more by the letter thereof, than a grant from one subject to another; in which case the grant is construed most in favour of the grantee.¹

The ownership of wreck, or separate fishery, does not, *per se*, give title to ownership of the shore.

¹ In Davis, Rep. 55, it is distinctly laid down, that "the

Enquiry whether a title to any part of the sea-shore, can be acquired by "prescription."

Our next enquiry is, whether a Lord of a Manor or any other subject, or a Corporation Sole or Aggregate, may also acquire an ownership in the sea-shore, by *prescription*. The learned writer, already quoted, (lord Hale), clearly alludes to that kind of prescription, or usage, which supports such franchises and usufructuary rights, liberties, and profits, as were just now mentioned, viz. wreck, royal fish, separate fishery, &c., the immemorial use and enjoyment whereof will, *per se*, support a title to them.

Prescription gives no title to lands.

It may be concluded from some of our best authorities,² that a title to "*land*" or freeholds corporeal cannot be supported by *prescription*. The words of Blackstone are, "no prescription can give a title to lands, and other corporeal inheritances, of which more certain evidence (of title) can be had;"³ and he states this more certain evidence to be, "corporal seizin and inheritance." Now, there are two "grant of the king passes nothing by implication."—The great case of the fishery of the river Banne, Ireland. In a recent case, the Duke of Somerset, v. Fogwell, this doctrine is distinctly recognized by Mr. Justice Bayley, who says, "in grants from the Crown, nothing passes unless the intention is manifest that it should pass;" 5 Barn. and Cres. 875.

² 2 Roll. 264, lib. 3, Co. Litt. 48, a, 113 b, 114 b, 195 b. Vin. Abr. title, Prescription.

³ 2 Blac. Com. 264, and see Doct. and Stu. Dial. i. l. 8, Finch 132, and see note to Com. Dig. title Franchise, where it is said, "land cannot be claimed by prescription." Hammond's Ed.—The text there, from Co. Litt. 114, b, has only relation to a "tenant in com-

grounds of title to land :— 1st. By *Grant*.
 2nd. By what is called *adverse possession*,
 founded on the *Statutes of Limitation*.

Two grounds
 of title to
 lands.
 1. Grant.
 2. Adverse
 possession
 supported by
 statute law.

A title by “adverse possession,” under the *Statutes of Limitation*, is, indeed, sometimes spoken of as held by “prescription;” but at common law, as at present understood, “prescription” alone, it is conceived, confers no *title* to freehold land. In the Scotch law, *positive* prescription is said to be “the acquisition of property, by the possessor’s continuing his possession for the time which the law has declared sufficient for that purpose.” *Negative* “is the loss or omission of a right, by neglecting to follow it forth, or use it during the whole time limited by the law.” Erskine’s Principles, p. 372. In the French Code it is laid down, “la prescription est un moyen d’acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées per la loi.” And this “moyen d’acquérir” is applied to *lands*, as well as to *incorporeal* rights. But when, in our law, the word is used in its technical sense, it does not correctly apply to a title to freehold lands or corporeal hereditaments.

Adverse possession of land without the aid of statute law, is no *title*; but prescription, as a title to incorporeal rights, is every thing without statute law. In prescription for a mon,” and see p. 51 post, and accord. Litt. Sect. 310.

customary privilege, immemorial usage is allowed to raise the presumption of an ancient grant. But as to land, whether there was or was not an ancient grant, is immaterial to the *effect* of the statute; for the statute may be a bar to the "best title in the world," and confirm the worst against all presumption.

The common law was peculiarly strict in all questions of title to the freehold, and realty. But upon questions of minor right,—as upon the enjoyment of some petty convenience, or benefit derived from the land,—it was not so strict; such claims, therefore, as a right of way, a right to fish, or a right to dig turf, or a right to pasture cattle, were allowed, upon the proof of a continued acquiescence on the part of the owners of the soil, for a time beyond memory of man. "Not that the Court believes" (as Mr. Butler¹ well observes) "that any actual grant of such right once existed;" but upon the general political principle of quieting possessions.

But immemorial usage *alone*, without the aid of statute law, will not, it is conceived, raise a title to land at this time of day; and especially not against the Crown. Whatever may have been the "old law," as explained by Bracton,² and Coke,³ previously

¹ See his note Co. Litt. 261 a.

² Lib. 2. fo. 51, 52.

³ 1 Inst. 114 b.

to the statute of Merton, (20 Hen. 3,) yet, from the time of that statute, title to land by length of time of possession, or, as Bracton borrows it from the civil law, "*usucaptio*," has depended upon statute law. Whether, under the feudal system, "*usucaptio*" was ever a valid ground of title to land, *as between subject and subject*, we need not stop long, in this place, to inquire; our inquiry being into the effect of such act against the Crown. It is said that, previously to the statute of Merton, "what length of "time was necessary to give such right [to "land,] was not defined by the law, but was "left to the discretion of the *Justices*;"¹ and it would seem to have been fixed by those Justices of whose discretion in this matter we have the earliest record, that no "seizin could "be alleged by the demandant in a real "action, but from the time of Hen. 1. This discretion of the Justices has, it is considered, ceased since the stat. of Merton, as regards title to the freehold and inheritance of lands.

It is to be noted, however, that neither the "discretion of the Justices," anterior to the statute law, nor the statute law itself, for a long period after the stat. of Merton, enabled a subject to make title to land, "by length "of time of possession" *against the Crown*.

¹ Reeve's Engl. Law, vol. i. p. 305.

The maxim "*nullum tempus occurrit Regi*" prevailed, until a period much later than the stat. of Merton.

Against the King, therefore, as it would seem, "prescription" or "usucaptio," did not, by our common or feudal law, give title to lands; and consequently it is contended, not to lands of the Crown covered by the sea, or upon the sea-shore. It is by the statute law² *alone*, without any reference to the "old" "law" of prescription, between subject and subject, (whatever that law might have been,) that adverse possession will, by lapse of time, prevail against the King's original and paramount title. These statutes are comparatively recent, so far as they affect the Crown; and are not founded upon any principle or right of prescription against the Crown, known to have prevailed in our feudal system of laws prior to those statutes.

Since the statute of Merton, therefore, as regards the law between subject and subject; and both *before* and since *that* and subsequent statutes, as regards the law between the Crown and a subject, there has existed and still exists a sufficiently marked distinction between "prescription" for certain usages or rights, and title to land under the statutes of

² 21 Jac. 1. c. 2, and 9 Geo. 3. c. 16.

limitation. Mr. Butler, in his annotations⁴ on Co. Litt., has touched upon this part of our subject, but would seem to have adopted the doctrine of lord Hale, in regard to titles to the "sea-shore," and to have considered such titles as capable of being made good by prescription. He first explains the distinction between titles, founded in *common right*, which is an ownership conferred by mere act of law; and titles acquired by the act of the party, and which are in derogation of such common right. "In inquiries," says he, "of this kind, "where it is said that a person is entitled to "the right or property in question, by *common right*, but that it *may* belong to another, it is "intended to say, that the right or property in "question, is, by common law, annexed to the "particular capacity of the party, or to some "property of which he is owner : yet, that it is "not so inseparably or inalienably annexed to "this capacity or ownership, but that the party "may transfer it to another. So, that in all "these cases, the presumption is in favour of "him to whom the right or property is said to "belong by common right; yet, this does not "exclude the possibility of its belonging to "another. To another, therefore, it *may* belong; but if he claim it, he must prove his "title to it. On the other hand, the party to "whom it belongs of *common right* is under no

Mr. Butler's
doctrine con-
sidered.

⁴ Butler's Notes to Co. Litt. 261, a. n. 205.

“obligation of showing his title to it; to him,
 “in the intendment of the law, it belongs till
 “there is proof of the contrary. To exemplify
 “this doctrine,—the lord of a manor is lord of
 “the soil of the manor of common right; that
 “is, if it be admitted or proved that he is lord
 “of the manor, his right to the soil so far ne-
 “cessarily follows, that it is not incumbent on
 “him to produce any proof of it. He may,
 “therefore, of common right, dig for gravel,
 “unless it is to the prejudice of his tenants.
 “But this right is not inseparable or unalien-
 “able from the seignory. The lord may grant
 “it (i. e. the right to dig gravel) to the tenants;
 “to the tenants, therefore, it may belong. But
 “if they claim it; it is incumbent on them to
 “prove their title to it. There are two ways of
 “doing this, one by showing the grant from
 “the lord; the other by *prescription*; that is,
 “by immemorial usage of it, which, in the
 “eye of the law, always presupposes a grant.
 “Now, prescription is shown by producing re-
 “peated and unequivocal instances of the im-
 “memorial usage or exercise of the right
 “contended for; the tenants, therefore, in the
 “case we have mentioned, if they cannot pro-
 “duce the original grant, must, to make out
 “their title to dig for gravel, produce repeated
 “and unequivocal instances of their having

* The word “manor” in- *magis continet in se minus,”*
 cludes the soil, as “*omne* —yet are they separable.

“ done it immemorially. If they do this, they
“ establish their title to the right in question.
“ But, though the lord is not called upon in the
“ first instance, to prove his title ; yet, when it
“ is claimed by others, he may disprove their
“ claim by shewing he has done acts inconsistent
“ with it. Thus, if on the one hand, the
“ tenants can prove, by repeated instances, that
“ they have exercised the right in question of
“ digging for gravel, the lord may, on the other
“ hand, show, that in all, or a considerable num-
“ ber of these instances, the parties have been
“ presented at his court, or otherwise punished
“ for the act in question, and this will instantly
“ destroy the effect of the evidence in their
“ favour, arising from the instances adduced by
“ them. In the same manner the lord may show
“ that they have dug only in one particular spot
“ of the waste, at particular times, or for a par-
“ ticular purpose ; by this he may circumscribe
“ their right as to the place, time, and manner of
“ its enjoyment. It should also be observed,
“ that though it is said that prescripton pre-
“ supposes a grant, and moreover presupposes
“ a release, it is not that, strictly speaking, the
“ court always, in these cases, *really believe*
“ that such a grant, or such a release are actually
“ executed, but because for the sake of the
“ general principle of quieting possessions, they
“ will not admit them to be disturbed by claims
“ long dormant, and therefore determine in the
“ same manner as they would determine if the

Prescription as giving Title to the Shore.

“very instrument of grant or release were produced.” The learned writer then goes on to say, (quoting from lord Hale,) “as to the *soil* “*between high and low water mark*, at ordinary “tides, this, of common right, belongs to the “King. It *may*, however, belong to a subject “by grant or *prescription*. Sometimes it is “parcel of the adjacent manor: sometimes of “the adjacent vill, or parish: sometimes it “belongs to a subject in gross:” “still, however,” says Mr. Butler, “it belongs of common right to the King: it is therefore incumbent on the subject to prove his right. This “may be done by producing the grant. Hale, “ib. ch. 4, 5, 6. Sir Henry Constable’s case, “5 Rep. 107. But as it is part of the possessions of the Crown, *jure coronæ*, it does “not pass by general words, and therefore to “establish a right to it under the grant, it “must contain such words as either *expressly*, “or by *necessary implication* convey the soil. “If the grant cannot be produced, it can *no otherwise* be proved than by ‘prescription,’ “that is, as we observed before, by repeated “unequivocal and immemorial *usage*. As to “*ports*, there is a very natural and important “distinction between the *franchise* of a port “and the *property of its soil*. As to the “franchise; by the common law, a port is the “only place where a subject is permitted to “unlade *customable* goods. This privilege “constitutes what is called the franchise or

“ port. To create the franchise of a port is
“ part of the royal prerogative. *But this does*
“ *not in anywise affect the property of the soil.*”
“ It may be considered as a striking instance of
“ the respect of the law of England for private
“ property, that though it entrusts the King
“ with the prerogative of originating ports ;
“ and though the use of the adjacent soil is es-
“ sentially necessary to the existence of a port,
“ the law does not permit the King to take any
“ part of the soil from the owner ; so that, if the
“ soil is not the property of the king, it is ne-
“ cessary to secure the property of the shore
“ beforehand, for the purpose of the port.⁶
“ The franchise belongs to the King of com-
“ mon right, but by charter or *prescription*, it
“ may be, and frequently is, the right of the
“ subject. The soil generally belongs to the
“ owner of the port ; but it is going too far to
“ say that it belongs to him of common right.
“ The mere grant of a port would not, in a
“ *modern charter*,⁷ pass the soil ; but *perhaps*
“ it would be sufficient in an *ancient* charter,
“ to pass it, if no evidence to the contrary could
“ be shown ; and it certainly would be consi-
“ dered to pass it in an ancient charter, if ac-

⁶ This renders it the more necessary to preserve the King's right to the shore, and to be strict in the proofs of title against him.

⁷ It is said in Comyn's Dig. title Navigation, (from 1 Rol. 5.) that a grant of a

port “ is not good, for a subject cannot have it.” As to the *soil*, indeed, no modern grant can be made of it by the king, by reason of the statutes against the alienation of crown lands.

“ accompanied with the additional circumstances
 “ of immemorial usage.” The learned anno-
 “ tator then adds :—“ Having thus shown to
 “ whom the soil of the shore and of ports be-
 “ long by common right, it remains to state
 “ succinctly the nature of the evidence by
 “ which the right to it may be proved to ex-
 “ ist in another.⁸ It may be done by showing
 “ that he, and those under whom he claims
 “ have immemorially, frequently, and without
 “ restriction to any part of the soil, dug
 “ gravel,⁹ fetched away sea-weed or sand, or
 “ embanked against the sea. If it is claimed
 “ to be part of a manor, the right of common-
 “ age for the cattle of the lord and the tenants;
 “ the prosecution and punishment of purpres-
 “ tures, in the court of a manor; its being
 “ included in the perambulations, *and every*
 “ *other act by which the right to the soil of in-*
 “ *land property is established*, may be given in
 “ evidence in support of it. The right to wreck
 “ of the sea, or royal fish by prescription *infra*
 “ *manerium*, is a strong presumption for the
 “ shore’s being a parcel of the manor. Lord
 “ Hale’s expression is very strong;—perchance,
 “ (say his lordship,) the shore is parcel almost of
 “ all such manors as by prescription have royal

⁸ Hale de jure Maris.

⁹ Yet copyholders do not acquire a right to the soil, by proving an immemorial custom to dig gravel or sand? Why therefore should

such act, by a lord of a manor, in the shore, raise a title in him, against the King, to the ownership of the shore?

“ fish or wrecks of the sea within their manors. But it should be observed, that though Wreck is frequently parcel of a manor, it is a royal franchise, and belongs of common right to the Crown. But by *grant* or *prescription* it may, and in fact, frequently does belong to a subject, sometimes *in gross*, but oftener, as *parcel of his manor*, parish, or vill, adjacent to the sea.”

Mr. Butler, in the foregoing note, adopts the doctrine of the treatise he quotes, that a title to the soil of the sea-shore, may be founded on prescription. He tells us also, that the same evidence which is allowed to establish inland title, *may* be adduced in support of titles to portions of the sea-shore; but he does not say that such evidence, and *no other*, *MUST* be adduced. On the contrary, we find that *wreck, royal fish, a separate fishery, right of digging sand, &c.* are also adduced as good evidence of title to the *land* or soil itself. This, however, it will be admitted, is not evidence which would support a title to inland property.

Mr. Butler's opinion as to the proofs of title to the ownership of the sea shore, considered.

Rights and privileges which do not imply or confer a title to the soil of inland estate.

Common of pasture, of turbary, of piscary estovers, rights of digging brick earth, or marl, and rights of way, in manors, are rights analogous to those of wreck, separate fishery, and digging of sand, &c. on the shore, and

Analogous
privileges in
the sea-
shore have no
greater effect.

yet none of these analogous rights are allowed to give title to the soil. Neither can the form or mode of pleading a title to these incorporeal rights or privileges, be used in pleading a title to land. Wreck, and a right of way are both founded on the like grounds of title, viz. either *grant*, or *prescription*, which prescription is, in substance, evidence or proof of usage, or custom, beyond memory of man, and which usage raises the presumption of an ancient grant of such privileges.

The shore is,
technically,
land.

Now, we have it laid down, as before quoted, that a title to land, i. e. freehold estate, cannot be founded on "prescription."¹ Are we then to conclude that the land or soil on the sea-shore is not, in legal intendment, or consideration, "*land?*" It is apprehended that no distinction whatever exists in legal construction, between the land on the shore, and land in the interior. Accordingly, in *Scratton v. Brown*,² the "shore" is expressly regarded, by the Court, as "land," in all its technical attributes, as a corporeal hereditament, held by tenure, and as a "moveable freehold." The Court said, "where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches."

There can be no difficulty in agreeing with

¹ P. 22 ante.

² 4 Barn. and Cress. 485.

Mr. Butler, that those acts which are evidence of title to inland estates, are equally available to prove a title to the land on the shore. Thus, for instance, if I inclose a piece of waste land in the interior, and cultivate it, this is an act *prima facie* denoting title; so, if I inclose by an embankment a piece of the sea-shore; for these are both actual taking seizin and possession of the land. If I can prove such seizin for a period of sixty years, in regard to such piece of land, whether on the coast or inland, the *statute law* confirms my title to such piece of land. Land on the coast, as well as land in the interior, may equally be acquired by adverse possession, and the statutes of limitation. When possession of land is taken adversely to the king's ownership, or to the ownership of a subject, the law requires that there should be some manifest act or acts of the party demonstrating an intention to assume the *territorial* ownership of the *locus in quo*. The intrusion or disseizin must be such as the statute may recognize as the substantial territorial acquisition which it (the statute) was intended to act upon and confirm. The statute was not passed for the purpose of confirming a partial ownership in the land; such as a right to dig marl, or to pasture cattle, but the *droit droit*, or absolute ownership. Such, therefore, ought to be the positive and unequivocal nature of the possession taken. There is no

Acts which are evidences of an inland title are evidences of title to sea-shore.

difficulty in admitting a title to a *districtus maris*, under an *express* grant from the Crown. But there seems some difficulty in determining what acts shall be considered sufficiently forcible and exclusive to oust the king's ownership in a certain *districtus maris*, still continuing open to the action of the tides. Every attempt of this kind is a *wrong*; and the less intitled to aid from the law, as being a wrong against the Crown. How far certain acts, more equivocal, but less difficult than are required in inland titles, will be held sufficient evidence of *ouster* and possession, in cases of *districti maris*, against the king, is not very clearly settled; but that there *are* acts sufficient to constitute *seizin* at law of certain portions of land covered by the sea, as so much *land*, seems to be allowed by the books. If this be so, it will *a fortiori* be admitted that the *sea-shore* is *land*, and capable of grant and conveyance, (for it has been granted and conveyed,) from one person to another, like other lands; and it must therefore follow, that such shore is capable of *seizin* in law; and it will also be admitted that portions of the sea-shore are *capable* of being taken such exclusive possession of, as, under the statutes of limitation, will ultimately make a good title. This forcible and exclusive possession of a portion of the sea-shore may be taken adversely to another

The sea-shore
capable of
seizin, in law.

individual, which is a *disseizin*; or against the King, which is an *intrusion*; and such disseizin or intrusion, may, after sixty years, by virtue of the statutes of limitation, work a good title to the disseizor, or intruder. The sea-shore, therefore, does not seem to be that species of property which, in its nature, requires from the indulgence of the law, a more relaxed, and less certain evidence of title than inland property. There is no necessity for our law to admit other evidence of title to the shore, than it calls for in regard to inland estate.

Lord Coke⁴ tells us, that "*prescription is* Prescription concerns things appendant or appurtenant.
"*regularly the mother of things appendant*
"*or appurtenant*;"⁵ and then proceeds to dis-

⁴ Co. Litt. 121, b. 122, a.

⁵ "Concerning things appendant or appurtenant, two things are implied; first, that prescription (which regularly is the mother thereof) doth not make anything appendant or appurtenant, unless the thing appendant or appurtenant agree, in quality and nature, to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal, which lie in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeal, as

a manor, house, or lands, or things corporeal to things incorporeal, as lands to an office. But yet, as hath been said, they must agree in nature and quality, for common of turbary, or estovers, cannot be appendant, or appurtenant to *land*, but to a house, to be spent there. Secondly, That nothing can be appendant or appurtenant to any thing, unless the principal or superior thing be of perpetual subsistence, or continuance; for example, an advowson, that is said to be appendant to a manor, is *in rei veritate*, appendant to the demesnes of the manor, which are of perpetual subsistence, and not to rents or

tinguish between what things may, and what may not be appendant or appurtenant; from which an inference is clearly deducible that "*land*" cannot be appendant or appurtenant to *land*.⁶ "A thing corporeal," says he, "cannot be appendant to a thing corporeal." But if the shore be land, then the shore cannot be appendant or appurtenant to adjacent land, or manors, or be prescribed for as such. The phrase "parcel of," signifies "*pars totius*," and denotes that the thing is an integral part, and homogeneous. But if *wreck* be *appendant*, and yet be allowed to carry the shore with it, then the *shore* is in effect appen-

services, which are subject to extinguishment or destruction. Co. Litt. 121, b. 122, a.

⁶ A recent case has expressly decided, that "land cannot be appurtenant to land." *Buszard and others, v. Cappel and another*. 8 Barn. and Cress. 141. In this case it had been found by a jury, in a special verdict, "that, by indenture, T. B. demised to W R. J. and G. J. all that wharf next the river Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever, to the said wharf belonging; and that by the indenture, the exclusive use of the land of the river Thames, opposite to, and in front of the wharf, between high

"and low water-mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised, as *appurtenant* to the wharf,—but that the land itself between high and low water-mark was not demised." Lord Tenterden, C. J. said, "it is difficult to understand how the *exclusive use* [of the land] could be demised, and the *land* not.—If the meaning of this finding be that the land itself, [i. e. between high and low water mark, in other words, 'shore or *littus*'], was demised as *appurtenant* to the wharfs, that would be a finding that one piece of land was appurtenant to another, which in point of law, cannot be."

⁷ Co. Litt. 8, a. 121, b.

dant, but according to lord Coke, this cannot be. It may be further observed, (as marking the distinction between things which may, and things which may not be prescribed for,) that *spiritual* persons may, and regularly do *prescribe for tithes*, because they are *incorporeal* hereditaments, when owned by spiritual persons; but *lay impropriators* cannot *prescribe* for tithes, because impropriate tithes, in lay hands, are not incorporeal hereditaments, but *real estate*, and of *freehold* quality, and have "the nature and all the incidents of temporal inheritances, and are sued for and recovered in the temporal courts in like manner as lands and other hereditaments."⁸ Hence a title to lay tithes, can no more be made "*by prescription*," than a title to lands.⁹ The very change from a spiritual to a lay inheritance, at once destroys all title by *prescription*.

Distinction
between
things which
may, and
things which
may not be
prescribed
for.

The essence of a prescriptive right is the *usage*. Proof of the usage, and proof of its *usage the essence of prescription.* having been in use *time out of mind*, are equally necessary. The thing claimed is the use, viz. a right to do, or enjoy in future, that which has been, and is proved to have been heretofore time out of mind, done or enjoyed. It is not the claiming one thing, *because* another thing has been used or enjoyed. Proof

⁸ Toller on Tythes, 16—18.

⁹ Toller 18.

that a common of pasture, or a road, or the franchise of wreck has been immemorially enjoyed, is confirmatory of my title to enjoy such common, or road, or wreck, in future. This right or privilege is not tangible, but exists only in the eye and contemplation of law. Either the express grant, or the continued and immemorial usage, is the best possible evidence the law can procure of the franchise or privilege claimed, and therefore it rests content with such evidence.

The law requires the very best evidence of the right which the nature of things will allow. Wherefore, if I claim a title to a thing which is tangible, and capable of seizin and manual possession, the law requires proof of such seizin or manual possession, either past or present, or both, as the best evidence that I have made it mine. The reason given (as before said) why land cannot be claimed by prescription, is this, that it is a thing capable of more certain evidence of ownership¹ than those things which lie in prescription are capable of; viz. of a transfer of the actual possession,—i. e. the land itself, from one to another,—from the last owner to the present. This actual transfer is called livery of seizin; and prescription never was, and is not now allowed to supply the place of seizin, in ques-

¹ Bl. Com. 264.

tion of titles to things of which seizin can be given.² Prescription is the allegation and proof of a *usage*, not *occupation*. The shore must be not merely *used*, but so *occupied* as of necessity to involve actual seizin or possession of it. If I prove such usage of it as is tantamount to seizin and exclusive possession, that is, in fact, showing title by *adverse possession*, and not by *prescription*, and it remains to be seen by the statute law whether my possession can be supported. Or, the land may be used as a mere convenience, as for a road, or as a fishing place; and if I prove such use of a road, or such custom to fish there, to have existed time out of mind, I have proved certain specific rights which the common law allows and confirms to me, without statute law. In such case I have made good my title to a *distinct* species of property from the land itself: why should the law go further, and *that* even

² There seems an exception which is given by Littleton, sect. 310, that "*tenants in common* may be "by title of prescription, as "if the one and his ancestors, or they whose estate "he hath in one moiety, "have holden in common "the same moiety with the "other tenant which hath "the other moiety, and with "his ancestors, or with those "whose estate he had *undivided* time out of mind." To this lord Coke subjoins, "but joint tenants cannot "be by prescription, because "there is survivor between

"them, but not between "tenants in common." There seems also another exception, Co. Litt. 121, 122, as to lands annexed to an office, which is an incorporeal *hereditament*, to which lands may be appendant or appurtenant, and pass by *deed* of grant of the office only,—but it appears that there must be a "*deed*," and secondly, the thing to which the land is appended must be *ejusdem generis*, i. e. an *hereditament*, which franchises, commons, and liberties are not.

against the King, by tacking to it a right to the very soil itself?

Prescriptive rights are no doubt all founded on *presumptive* evidence, and therefore it is that land cannot be prescribed for; i. e. presumed in point of title.³ To say that the shore lies in prescription, is placing it on a par, in point of title, with mere easements, which is surely incorrect.

As to evidence
of boundaries
in titles.

As to the evidence to particular *limits* and *boundaries* of estates, it is to be remembered, that in every such enquiry of metes and bounds, the titles to the *estates* of which some particular spot in question is claimed to be *parcel*, are not disputed, but are admitted to be good, according to the strict rule of evidence of title to lands; the question only refers to, and concerns the metes and bounds of the respective estates. But, as against the Crown, *reputation* does not seem admissible, in such question.⁴ It has also been refused between two private disputants.⁵ There is no doubt but that *written* documents, or sixty years quiet possession, under the statutes of limitation, will prevail over all verbal testimony, or prescriptive—which is presumptive evidence, however strong. Where there is nothing but presumptive evidence on both sides, except

³ 2 Bl. Com. 264. See p. 13, ante.

⁴ 2 Roll. Abr. 186, pl. 5, tit. Prerogative.

⁵ See 14 East 331, note.

that one has positive possession, the Courts of law do no more than refuse to disturb the possession.

Now, as between the King and a subject, in respect of the sea-shore, there can be *presumptive evidence but on one side only*, the King's right is not presumptive, but a legal title of the strictest kind; the common law itself is the King's evidence of title, and no better can exist; and presumptive evidence must necessarily be inferior to it. In the absence of any grant or documentary title, the only other title to land is, it is conceived, by adverse possession, ratified and confirmed by the statutes of limitation. Can, then, adverse possession, or seizin of the soil of the sea-shore be *legally proved* by mere evidence of a right of wreck, a right of fishery, or the privilege of digging sand? Are these such uses of the land itself as necessarily carry with them the seizin and possession of such land? It is difficult to admit this doctrine. If the *freehold* of the shore were intimately and *essentially* connected with the franchise of wreck, or those other franchises, liberties, or usufructory privileges which are enjoyed thereon, then indeed, a title to the one could not be made good without involving with it the title to the other. But if we examine the nature and quality of these franchises, liberties, and privileges, which are noticed by our law, we shall find, that they not only do not neces-

The king's title is positive, and by the common law.

Adverse possession of the shore may be confirmed by statute law, but not by prescriptive rights to wreck, &c.

sarily involve or carry with them the soil of the sea-shore, but that they may, and generally do, actually exist separate and distinct from the ownership of the shore,—as such examination is not foreign to our subject, we will consider these franchises and privileges, in their order.

Profits.
Franchises
and liberties
derivable
from the sea.

The franchises, liberties, profits, and advantages derivable from the *sea*, may be considered as follows :—

1st. Fishing,⁶ public and general, or private and several.

2nd. The use of the sea for the transportation of merchandise in traffic, and for ports, or for any other purpose of use or enjoyment to which it can be applied.

3rd. The perquisite of what in our law is called Wreck,⁷ being the unclaimed ships and cargo wrecked on the shore.

⁶ Whale, sturgeon, and porpoise, whenever and by whomsoever caught in the British Seas, are the property of the Crown by royal prerogative. They each constitute what in our law is called a royal franchise. Such franchises, however, were formerly granted away by the Crown to a

subject; limited within certain districts, as a manor, hundred, &c. In Scotland, salmon seems to have been, inter regalia. See Erskine's Principles.

⁷ Wreck is also a royal franchise, and with the perquisites called flotsan, jetsan, and ligan, were formerly often granted,

The uses and profits of the *shore* are,—1. ^{And of the shore.} Fishing; 2. Wreck, and its accompaniments flotsan, &c.; 3. Egress and regress, and right of Way, for the purpose of navigation, fishing, bathing, and other uses of the sea; 4. Ports; 5. The digging and carrying away its soil and materials for building, ballast, manure, &c.

Now, as we have already attributed, the absolute ownership of the sea, and sea-shore to the King, *ab origine*,—it might be thought that the above perquisites are absolutely his own, and grantable exclusively, to any one of his subjects. But according to the acknowledged law of the land, although the King is owner of this great waste; *yet the common people of England have regularly a liberty of fishing in the sea, and creeks and arms thereof, and in navigable rivers within the tides, as a public common of piscary.*⁹

within certain territorial limits to the subject, as within a manor, hundred, &c. 1 Bl. Com. 290.

The above regalia, or royal franchises are possessed by the crown, not in respect of the land or soil of the shore, or the ownership of the sea, but by the royal prerogative, in distinct and peculiar ownership.

⁹ De Jur. Maris, p. 11.

⁹ Lord Fitzwalter's case, 1 Mod. 105. Anonymous. 6 Mod. 73. Warren v. Hastings. 1 Salk. 357; S.

C. 2 Salk. 637. 16 Vin. 354, pl. 1. Ward v. Crosswell, C. B. 14 & 15 of Geo. II. Sir J. Davy's Rep. 57.

The great salmon-fishery on the River Banne in Ireland. See also Bro. Abr. Prerog. pl. 35, and 5 new Abr. 156. Carter v. Murcot. 4 Burr. 2163. Plowd. 315. Bro. Custom, 46. Fitz. Bar. 93. Bagott v. Orr, 2. Boss. and Pull. 472. Mayor of Oxford, v. Richardson, 4 T. R. 438, and see 4 Com. 216, 217, 410. "Jus piscandi omnibus commune est in

Public right
of fishing in
the sea.

This public or general right of fishing in the sea, claimed by the subject, is a beneficial privilege enjoyed by British subjects, time out of mind. Whether, in fact, it was originally a public grant from the King, or whether it was a reservation by the people of such right, when they vested the rest of the property of the sea in him, or whether it be one of those natural and necessary rights which, like the air we breathe, has ever been free and unquestioned in enjoyment, is immaterial; for the conclusion is the same; viz. that such right of fishing has immemorially belonged to, and been enjoyed by the public, and that, in point of title, it is admitted to be held and enjoyed *by common right*, i. e. by the common law, and custom of the Realm.

Navigation.

The use of the sea, *as a great high way*, for the transportation of merchandize, or any other purpose for which its waters can be usefully navigated, is also a liberty or privilege belonging of common right to the people of England, by the same title as the fishery.

Wreck and
royal fish.

But wreck, and royal fish, are royal fran-

porta et in fluminibus," Bract. Lib. 2—8, ch. 12. Here it is observable that Bracton makes no distinction between those parts of rivers which are, and those

which are not within the flux and reflux of the tides. The public right does not seem to extend above the tides. See accord. Per. Hale, Ch. J. 1 Mod. 105. Davis 57.

chises, belonging exclusively to the King, by the prerogative of the Crown, or to individuals, deriving them, as an exclusive private possession from the Crown. For the present we will confine our view to the *fishery*.

The public right,¹ or common of piscary, <sup>Public fish-
ery.</sup> claimed and allowed by the common law to the people of England in the sea, extends, not only over the open sea, but over all bays, creeks, ports, havens, arms of the sea, and tide-rivers, up to the reach of the tide,² and also, as it would seem, *over and upon the sea-shore itself*, for such kinds of fish as are usually caught upon the rocks, and sands of the coast.³ But in some cases, statute law has set bounds to the exercise of this right, in respect of seasons, particular kinds of fish, and manner of fishing. There are also other excepted cases; viz. where private indivi-

¹ In 6 Mod. 73, it is said, that the King's grant could not bar the public of their right to fish, and as it is a rule that nothing can be *prescribed* for which might not have a lawful commencement by *grant*, it would follow, that no such thing as a separate fishery in the sea, or tide-rivers, could exist if this were good authority. But, 6 Mod. 73, is clearly not law, so far as regards *ancient* grants, and was over-ruled in *Carter v. Mur-*

cot, 4 Burr. 2163. The doctrine of 6 Mod. 73, is also held (as to the sea), in 2 Com. 431, and is supported in a note (see this note cited in p. 53 post), to *Carter v. Murcot*. At this day the King cannot, by grant, abridge the general public right, nor has any such right existed in the Crown, since *Magna Charta*.

² See the cases cited page 45 ante.

³ *Bagott v. Orr*. 2 Boss. and Pul. 472.

Public Right of Fishing in the Sea.

duals,⁴ or Corporate bodies, claim and enjoy a separate fishery, in some particular places, in derogation and exclusion of the general right.

Several or private fishery.

This divides the right of fishery into commonis piscaria," or the public common of piscary mentioned above, and the *several*, or *private* fishery belonging to particular owners, and excluding all other persons. The *several* fishery is claimed and enjoyed by *prescription*, or *ancient usage*, presupposing a grant, or by express grant from the Crown, anterior to Magna Charta.

The public fishery includes a right of egress and regress, &c.

As the public right of fishery cannot be enjoyed without making use of the sea-shore for egress and regress, and for other essential conveniences which the fishery requires in order to be carried on with effect, the use of the *sea shore*⁵ for all purposes essential to the

⁴ Davis's Rep. 57, a. Carter v. Murcot. 4 Burr. 2. 163. Warren v. Matthews. 1 Salk. 357. Hale de Jure Maris. cap. 5.

⁵ We do not speak here of the "*ripa*," or bank, which is adjacent *terra firma*, but of the *sea-shore* only. But for all reasonable purposes of safety and convenience in fishing, and navigation, the *ripa*, or immediate *terra firma*, is, by common right, subject to the

free egress and regress of the public. Bro. Tit. Custom, pl. 46. But this does not extend to any *permanent* appropriation of such *ripam*. Nor will it authorise *towing-paths* to be made. Ball v. Herbert, 3 T. R. 253. Towing is not navigation, properly so called. But, it seems, *towing-paths*, and other modes of moving, raising, and securing vessels, and fishing-boats, &c. upon the adjacent

enjoyment of the right of fishery, necessarily accompanies such right. But it is quite clear that the public use of the shore, for the public exercise of the fishery, *does not impeach the King's ownership or property in the soil itself*.¹ Wherefore, the King remains owner of the shore, liable to such use of it by his subjects, as their ancient common of piscary therein, and in the waters around it, naturally calls for; and this would seem to include a public *right of way* to and fro over the sea-shore.

A *severel* or *private* fishery² is claimed, not Severel fish-
ery. only against the King's original right, but against the general public right of the subject. It may be either in gross, i. e. an abso- In gross. lute personal right, or privilege attaching to the individual, or Corporate body of individuals; (as many Religious Houses formerly had;) or it may be appendant or appurtenant to manors; Or appendant
or appurte-
nant. and *this*³ not only in navigable rivers, and arms of the sea, but in creeks, ports, and havens; and in *certain known limits in the open sea, contiguous to the shore*. In 2 Com. 431, the contrary is held, as to the *sea*; but in 4 T. R. 437, *Mayor of Oxford v. Richardson*, where both a *severel*, and a *free* fishery were pre-

terra firma, may well be acquired, and enjoyed by usage, or prescription, as a local easement, S. C.

¹ See Mod. 106.

² See p. 59 post, further on this kind of fishery.

³ De jur. Maris, 18.

scribed for, Lord Kenyon said, "there can
 "be no doubt but that there may be a *pre-*
 "*scriptive* right in a subject to a several
 "fishery in an arm of the sea."

Fishing,
 modes of—

1. By nets,
 lines, &c. 2.
 By wears and
 fixed places.

Fishing, in practice, may be of two kinds,
 viz. 1. with nets, hooks, or other moveable
 apparatus; 2. or by means of wears,⁴ stakes,
 and fixed enclosures or fishing places. Now,
 it is obvious, that the public right of fishing
 cannot be carried on by the latter modes, since
 an enclosure by one person excludes others.

As to fishing
 with nets, &c.

Fishing with nets, hooks, &c. may, accord-
 ing to the treatise *De jure Maris*, be
 "either as a liberty, without the soil; or arise
 "by reason of⁵ or in concomitance with
 "the soil itself, and the proprietorship of it."

The public
 fishery is a
 floating right,
 with nets, &c.
 only.

Now, as the public cannot claim the soil under
 the sea or of the shore itself, the *public* fishing
 of the subject is a floating liberty of fishery,
 with nets, hooks, &c.; whereas the *several*, or
 private fishery, may be claimed, either as an
 individual personal right of fishing with nets,
 hooks, &c. *in loco*, the soil or shore whereof
 belongs to the King or to any private sub-

⁴ See de jur. Mar. 21,
 for numerous instances of
 these wears.

⁵ Sed q. By reason of?
 for the mere ownership of
 the soil does not exclude
 the *public right* of fishing in
 the sea,—even when the

King is such owner? there-
 fore, the mere ownership of
 the soil in a subject, is not,
per se, a sufficient ground
 for an exclusive private
 fishery in the sea, or tide
 rivers.

ject; or it may be claimed as appendant, or appurtenant to the ownership of the adjoining manor, or freehold.

The public fishery, and private fishery are incompatible⁶ with each other. So also is a right to fish with nets, hooks, &c. (moveable machinery) incompatible with a fixed fishery. No fishery with nets, hooks, &c. can be enjoyed by the public, or even by one person, in a place where another enjoys a *private* right to make weirs, and enclosures; and yet both these kinds of fishing may be enjoyed in waters,—the shore and soil of which belongs to another; nor can such owner of the soil or shore prevent the other from exercising his paramount right to fish. Thus, all the subjects of the Realm have a right to fish in the sea or any creek thereof, or in a tide river, the shore and soil of which place of fishing belongs to the King, or to the lord of the manor. Or the lord of the manor alone, may have a separate fishery, not only exclusive of his manorial tenants, but also of all other persons; or some other individual may have a separate fishery, exclusive of the lord, and all other persons, or a *free* fishery in common with the lord.

The public fishery and the private, are incompatible with each other.

⁶ In the case of *Mayor of Oxford v. Richardson*, cited in note to page 45, Buller J. said, “one party is to prove that this is an arm of the sea, in which, *prima*

“*facie*, every subject hath a right to fish; the other is to establish a prescriptive right which destroys the general right.

Private fishery considered, as giving colour of title to the sea-shore.

As the private or several fishery alone, gives colour of title to the sea-shore, or soil itself, it will be necessary for us to consider this private right more minutely.

That the ownership of the sea-shore, or the soil under the sea to any given distance, should include a right to fish, seems reasonable enough; and, accordingly, the King's general right of ownership to the shore and sea-bottom, doubtless entitles him to fish, in common with his subjects. In like manner, if the King have conferred such ownership of any part of the shore on a subject, (as on a lord of a manor,) the general right of fishery does not exclude the lord.¹ But the mere ownership of the shore, whether possessed by the King, or by a lord of a manor, will not entitle the owner to establish a *separate* fishery, and exclude the public. In fact, the mere ownership of the soil will not, it would seem, confer or include a right to a separate fishery in the sea or tide-rivers, whether by nets and lines, or by weirs and enclosures.² The right

The ownership of the soil of the shore does not entitle such owner, to establish an exclusive fishery.

¹ If a man claim to have "*communiam piscariam*," or "*liberam piscariam*," the owner of the soil shall fish there. Co. Litt. 122 a.

² "In case of a *private river*, the lord's having the soil is good evidence to prove that he has the right of fishing, and it puts the proof on them

"that claim *liberam piscariam*;" "but in case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all, and if any will appropriate the privilege to himself, it lies on his side."—per Hale, Ch. J. 1 Mod. 106.

to exclude the public can only be supported by prescription, i. e. by evidence of immemorial usage. A several and exclusive fishery; immemorially enjoyed by an individual subject, or a Corporate body, will exclude the public right. The common law gives stability to a right thus immemorially enjoyed; and although the public may claim a preference, where the usage is doubtful, yet, where the usage is proved to have existed on the side of the individual, and to have been acquiesced in by the public, time out of mind, the public will be excluded, precisely as if such private fishery had been granted by the King himself, to the individual.³

³ In a note to *Carter v. Mercot*. 4 Burr. 2165, the following remarks are made upon the doctrine of separate fisheries. "According to several authorities, every navigable river, as far as the sea flows and reflows, is an arm of the sea, and it may perhaps not be unreasonable to admit such property may be by *prescription*, in some such navigable river; but in the sea or in such rivers as have free communication with the sea, where the catching of fish cannot diminish the stock, more than it could in the sea, the right which the subjects confessedly have, to fish there, ought not to be suffered to be restrained, either by *prescription*, or by the *King's grant*; for it

is a principle incontestable, that all customs, prescriptions, and royal charters, that are either contrary to reason, or the good of the commonwealth, are void; and it is apparent that all such restrictions are against both, and are injurious to the public in hindering a large supply of fish, as well as a means of livelihood to many particular persons, without any benefit to the public, or to any but monopolists, and enhancers of the price of fish; but in rivers not having a free communication with the sea, the case is quite different; for if the fishery there is made private property, the same would be preserved, and produce more, than if all persons were allowed to fish

It seems certain that the *mere ownership* of the soil will not *exclude* the public, or authorise the owner to exclude the public fishery; for no subject can take more than the King had to grant, out of the shore or seabottom, and therefore the grantee must have taken his grant, subject to the public common right of piscary, to which the sea and *seashore*, were liable, even in the King's hands. Therefore, although the ownership of the soil may afford some colour, or pretext to the claim of the individual to a private or several fishery, yet, unless such owner, and the former owners of such soil, have immemorially excluded the public, by means of a separate fishery, prescribed for, and *proved*, or founded in express ancient grant, the public right will prevail.

It is not, therefore, the ownership of the soil, but immemorial usage or prescription, and ancient grant, which support the several

there, for by that means, the breed would be in a manner destroyed, as is the case in many rivers not supplied by the sea. No modern grant can be made by the King of a separate, or free fishery in the sea, or on the sea-coast, or in navigable rivers. Since the time of Henry II. all grants from the Crown of this kind of fishery have been contrary to Statute * Law, viz. Mag-

na Charta, and the Charter of Henry III. and subsequent Acts of Parliament; and therefore, if a grant *be produced*, it must be dated so far back; the consequence is, that these kind of fisheries are always *prescribed for*. An ancient grant was put in, in the case of Warren v. Mathews, 1 Salk. 357, and probably others may be found, particularly to ancient Abbeys.

* See 2 Bl. Com. 39.

and exclusive fishery; and if so, then, it seems singular to hold, (as Lord Hale seems to do,) that a several fishery by means of wears, or fixed stakes, &c. "*is the very soil itself:*"¹ i. e. that such kind of fishery can, *per se*, be sufficient to confer a title to the soil itself. For, if the ownership of the soil will not confer an exclusive fishery, (which in the eye of the law is a *minor* right, and rather an adjunct to the soil,) why should the mere right to fish confer a *greater*, and in the eye of the law a more valued right, to land itself, thus making the greater an adjunct to the less? This is reversing the law rule, "*majus dignum continet et trahit ad se minus dignum.*" Why is it not enough to construe it a separate fishery, of the kind proved according to the prescription? Why should the mode of fishing, which is varied according to the kind of fish, their habits, and haunts, be construed into an ownership of the soil? A right to catch fish by nets or wears, is still, in either case, no more than a mere right of fishery. Why should the owner of the land around be deprived of the soil where the private fishery *was* once enjoyed by *another*, but which has ceased, by the permanent drying up of the waters?²

The doctrine that the ownership of the soil affords a presumption in favour of a separate

¹ De Jur. Maris, 18.

² Co. Litt. 4, 6.

right of *fishery*, does not involve the same consequences of law, as saying, that a separate fishery gives a right to the soil, for *this* involves the question of title to *land*, and the form or mode of supporting that title. To say that if I prescribe for, and prove a separate fishery, I thereby gain the ownership of the soil, is as much as to hold that I may prescribe for an ownership in the soil; i. e. that a title to land, or fee simple estate, may be supported by prescription; a doctrine denied by some of our best authorities. It is also remarkable that, when we get *beyond* reach of the tides, and the river is no longer *pars maris*, the doctrine is, that the ownership of the adjoining land, is good presumptive evidence that such owner has the exclusive right of fishing,—per Lord Hale, Ch. J. 1 Mod. 105;—but as soon as we get *within* the flux and reflux of the tides, the doctrine is reversed, and the ownership of a private fishery, is *said* to be good presumptive evidence of title to the soil itself. This, in itself, seems singular doctrine.

A freehold, or title to land, is one right and thing, and a fishery is another, and the rights and titles to these several things are not supported in like manner. A fishery, as well as any other franchise, liberty, profit or easement (as a right of road

^a Co. Lit. 114 b.

or way over another man's ground, or a right to pasture cattle on the manorial waste or common) may, as before explained, either be founded on express grant, or prescriptive usage; whereas, a title to land must be founded either on express grant, or on what is called "*adverse possession*;" which is not what our common law intends by "*prescription*."

It is remarkable, that the cases of separate fisheries, cited in the treatise ascribed to Lord Hale, p. 19, 20, 21, by way of authority that a separate fishery carries the soil, do all use the term *piscaria*, which signifies merely a fishery; and not one assumes an ownership of the soil, in virtue of the "*piscaria*," even where it is claimed as "*separalis*." In some cases the "*piscaria*" and the sea-shore, are mentioned separately; thus, "the Earls of Devon had, not only the port of Toppesham, but the record tells us, that the *Portus et Piscaria*, et *mariscus*¹ (marsh) de Toppesham spectant *amicie Comitissæ Devon*." The only plausible instance adduced by the learned writer to prove that a separate fishery includes the ownership of the soil, does not seem, upon examination, to support such doctrine.

Lord Hale's authorities considered as to the fishery giving the soil.

"Trin. 10, Ed. 2. B. R. Rot. 83, Norfol-

¹ Jur. Maris 20.

soil, Co. Litt. 4 b. But

² "*Mariscus*" will pass the "*Piscaria*" will not.

“chia.—The abbot of Benedict Hulm,¹ im-
 “pleads divers, for fishing in riparia qua se
 “extendit a ponte de Wroxam, usque quan-
 “dum locum vocatum Blackdam. Pending
 “the suit, the King’s Attorney came in,
 “and alledged for the King, quod prædicta
 “riparia est brachium maris, qua se extendit
 “in salsum mare, et est riparia Domini Regis
 “salsa fluens, ubi naves, et battelli, veniunt
 “et applicant extra magnum mare carcati et
 “discarcati quiete, absque tolmeta, seu custu-
 “ma aliqua dando, et est *communis piscaria*
 “quibuscumque; et dicit quod presentatum
 “fuit, in ultimo itinere, coram Solomone de
 “Roffa, et Sociis Justiciariis itinerantibus in
 “comitatu isto, quod prædecessor prædicti
 “Abbatis fecit purpresturam super dominum
 “regem in riparia prædicta, gurgites plantan-
 “do in eadem, et appropriando sibi præ-
 “dictam *piscariam tenendo tanquam separa-*
 “*lem*; per quod consideratum fuit, quod gur-
 “gites illæ amoverentur, et quod prædicta aqua
 “remaneret *communis piscaria*. Et petit quod
 “nunc procedatur ad aliquam inquisitionem
 “inde capiendam quousque præfati justiciarii
 “super recordo et processu prædictis certio-
 “rentur. Thereupon search is granted, and
 “the record certified; and afterwards, a
 “procedendo was obtained; and issue being
 “joined, it was found for the Abbot, and judg-

¹ Case of the Abbot of Lord Hale, Jur. Maris. 21
 Benedict Hulm, quoted from et sequ.

“ment and execution, given against the defendants for the damages; viz. £200.”

“Upon which record,” says the learned writer, “these things are observable:—

“1st. That, *de communi jure*, the right of such arms of the sea belongs to the King.

“2nd. That yet, in such arms of the sea, the subjects in general, have, *primâ facie*, a common of fishery, as in the main sea.

“3rd. That yet, a subject may have a separate right of fishing, exclusive of the King, and of the common right of the subject.

“4th. That in this case, the right of the Abbot to have a several fishing, was not a bare right, liberty, or profit *a prendre*; but the right of the very water, and *soil itself*; for *he made wears in it*.”

With deference, however, to such eminent Comments. authority, it does not seem very observable, upon this record, that the Abbot *had* the right of the “water, and *soil itself*,” *because* he made wears in it. Nothing more, in fact, appears, than that the Abbot by making wears, claimed to have *piscariam tanquam separalem*, (a private fishery,) which, on trial, was

allowed against the King, who claimed the fishery in favour of all his subjects as an open right.¹ That separate fisheries, by means of water sluices, wears, &c. may, and frequently do, belong to subjects in right of their manors, and as appendant to their manors, &c. there can be no doubt, for these may be prescribed for. That the soil where these separate fisheries are, *may* be "*parcel of*"² a manor, (i. e. within the boundaries and *parcel*, as the other lands within the manor are *parcel*,) is also admitted.—In the principal creeks and tide-rivers of England, and in the flat and marshy districts upon the coasts, these fisheries, some with, and some without the soil, are not unfrequent. But, it does not follow, that because they *may* be good in point of title by prescription, *as fisheries*, they confer also a title to the soil itself, without other evidences.

Lord Coke, in his Com. on Litt. 4 b. says, "if a man be seized of a river, and by deed

¹ P. 34, Ed. I. B. R. Rot. 14 Kancia Prior de Coningshed implacitat Abbatim de Ferneys pro prostratione Gurgitis in aqua de Ulverstone. Defendant justified, because *each end* of the *wear* was fastened upon the abbot's land. The abbot replies, quod Wilhelmus de Lancaster Dominus de Kendal dedit prædecessori domus suæ prædictæ *aquam* et *piscariam* ex utraque parte ejusdem quantum im-

petus maris fluxit et refluxit. Here the wear is treated as a mere fishery. Vide Rastall's Entries, trespass in piscary, pl. 4. Prescription for *several fishing*, in aqua maritima fluente et refluxente in seizonabili tempore cum 7. stallis separatis *separalis piscariæ fixis pro ratibus*. Vide de Jure Maris, p. 19.

² The phrase "*parcel of*," does not seem synonymous with "appendant" or "appurtenant."

do grant, 'separalem piscariam' in the same, and maketh livery of seizin, 'secundum formam chartæ,' the soil doth *not* pass, for the grantee may take water there, and *if the river become dry he may take the benefit of the soil*; for there passed to the grantee but a particular right. For the same reason, if a man grant 'aquam suam,' the soil shall *not* pass, but the pischary within the water passeth. And land covered with water shall be demanded by the name of so many acres 'aquâ coopertas,' whereby it appeareth that they are distinct things."

There certainly exists a difference of opinion amongst the authorities, as to whether a "separate fishery" necessarily, and, *per se*, includes the soil, or not. This question is ably considered by Mr. Hargrave in a note to Co. Litt. 122 a, note 7,³ and he concludes in the *negative*. After quoting a passage in 1 Inst. 122, relative to this subject as follows: "a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariam*, or *liberam piscariam*, the owner of the soil shall fish there." Mr. Hargrave observes, "according to this passage, ownership of the soil is *not* necessarily included in a several fishery, and common of fishery, and free fishery are

Mr. Hargrave's opinion that a separate fishery does not give title to the soil.

³ Hargrave's note to Co. Litt. 122 a, note 7.

“the same thing.” He then refers to Judge Blackstone’s doctrine, who lays it down, “that
 “the ownership of soil is essential to a *several*
 “fishery; and that a *free* fishery differs both
 “from *several* fishery, and *common* of fishery:
 “from the former, by being confined to a
 “public river, and not necessarily compre-
 “hending the soil: from the latter by being
 “exclusive.” 2 Black. Com. 8 Ed. 39. Mr.
 Hargrave replies to this: “We doubt whether
 “this distinction may not be, in a great de-
 “gree, questionable. 1. In respect to a se-
 “veral fishery,—where is the inconsistency in
 “granting the sole right of fishing, with a re-
 “servation of the soil, and its other profits?”
 Bracton expressly takes notice of such a
 “grant; for his words are, that one may ‘ser-
 “vitutem imponere fundo suo quod quis possit
 “piscari cum eo, et ita in communi, vel quod
 “alius per se ex toto.’ Brac. fo. 208 b.
 “There are also numerous other authorities for
 “it; the old books of entries agreeing, that one
 “may prescribe for a *several* fishery against the
 “owner of the soil; to which should be added
 “the three cases of Elizabeth, cited by Lord
 “Coke. See Lib. Intrat. 162b, 163a, Rast, Entr.
 “597 b, and the books cited under the letter d,
 “in fol. 4, 6, and under, m, here, and the cases
 “referred to under the * on the other side. Nor
 “do we understand why a *several* piscary
 “should not exist *without* the soil, as well as a
 “several pasture, as to which latter we have

“already shown the doctrine to be settled,
“supra. n. 6. The chief reasons which occur
“against Lord Coke, seem to be these:—Se-
“veral writs, never applicable except to the soil;
“lie for a piscary; such as a *præcipe quod red-*
“*dat, monstraverunt de rationabilibus divisis,*
“and trespass, which latter writ is particularly
“insisted on by Lord Ch. J. Holt. Dav. 55 b.
“Hugh Comm. Orig. Wr. 11 W. Jo. 440.
“1 Vent. 122. 2 Salk. 367. Skinn. 677.
“*Suum liberum tenementum* is a good plea to
“trespass for fishing in a several piscary. 17 E.
“IV. 6. 18 E. IV. 4. 10 H. VII. 24, 26, 28.
“The soil will pass, as it is said, by the grant
“of a piscary. Plowd. 154. But all these
“objections may be repelled. The writ relied
“on will not always lie for a piscary. Thus,
“if a *præcipe quod reddat* is brought of a pis-
“cary in the water of another person, the writ
“is bad, and *quod perimat* is the proper re-
“medy. Fitz. Abr. Briefe. 861. F. N. B. 23,
“i. and note b, of the 4to ed. Besides, in
“the cases of actions for trespass in a several
“piscary, or at least in some of them, the writ
“seems in effect to state a several piscary in the
“plaintiff's own soil, which therefore proves
“nothing as to the sense of several piscary
“without further explanation. Reg. B. R. Orig.
“95 b. Carth. 285. Skinn. 677. The plea
“*liberum tenementum* may be replied to by
“prescribing for a several piscary. See the
“books before cited, as to such a prescription.
“Though the *grant* of a piscary generally, may

“*perhaps* pass the soil, yet it will not, if there
 “are any words to denote a different intention ;
 “as where one seized of a river, grants a se-
 “veral fishery in it, which is the case put by
 “Lord Coke in another place ; and much less
 “will the soil pass when there is an express
 “reservation of it. Ante 4 b, and n. 2, there.
 “Hence, as it should seem, the arguments are
 “short of the purpose ; for, at the utmost, they
 “only prove that a *several* piscary is presumed
 “to comprehend the soil, till the contrary ap-
 “pears, which is perfectly consistent with Lord
 “Coke’s position that they *may* be in different
 “persons, and *indeed appears to us the true*
 “*doctrine on the subject.*”¹

Comments.

But the doctrine thus noticed by Mr. Hargrave, is not, as applied to the Crown, precisely the same as when applied between subject and subject ; nor is it the same when applied to the soil *beyond or above* the flux and reflux of the tides, as when applied to the soil upon the *shores* of the sea, and tide-rivers. Admitting that a *several* fishery, in waters *not* subject to the tides, and, therefore, no part of the sea, may, between one subject and

¹ In *Partheriche v. Mason*, 2 Chitty’s Cases temp. Mansfield, 661, Lord Kenyon is made to say, “there is no reason why a person may not have a several fishery in *alieno solo*.” But the Report adds, “*SED PER CURIAM*, where a man has a several fishery, the pre-

sumption is, that he has the soil ;—that presumption is conclusive, *if not opposed*.” But this was said of a fishery in a river *not within the tides* though navigable. *Within* the tides the presumption is always *opposed* by the King’s title, see also Lofft. 364.

another, be made ground of presumption, (where there is no proof to the contrary,) that the soil goes with it, (although from what is before said, p. 44 *et seq.* a presumption of that kind does not seem *necessary*,) it may be insisted, that between the *flux* and *reflux* of the tides, every such presumption is against the right of the Crown, and, that implication is not to be made against the King. A very modern case would seem to justify this distinction;—the case is that of the Duke of Somerset v. Fogwell,¹ in which letters patent of the 44th of Eliz. were given in evidence, by which she granted to Edward Seymour, Esq., his heirs and assigns, “all those domain
“lands and manors of Berry Pomeroy and
“Bridgetown Pomeroy, and the castle of
“Berry Pomeroy, with all their rights, members, liberties, and appurtenances, in the
“county of Devon, then lately parcels of the
“lands, and possessions, and hereditaments
“of T. Pomeroy, Kt.,” and after making use of general words to pass the lands, &c. and tithes of Berry, her majesty granted “*all*
“*waters, fisheries, &c.* to the aforesaid
“manors, castle, and premises, and to each
“and every of them belonging, or appendant,
“known, accepted, held, used, or reputed or
“deemed as part or parcel of the same premises.” There were also produced two fines, one levied in 2 Ed. VI. and the other in

¹ 5 Barn. and Cress. 875.

2 and 3 William and Mary, of the manor, &c. "*ac de separali piscaria de aqua de Dert.*" It was also proved, that the present Duke, and his ancestors had, since 1765, regularly received a rent for the *fishery* in the river Dart, which was a navigable and *tide-river*. In the course of the argument, the doctrine of Judge Blackstone "that ownership of "the soil is essential to a several fishery,"—and the contrary doctrine of Lord Coke, before quoted,² and the argument of Mr. Hargrave in the text, were mentioned and commented on.—The question, whether the words of the letters patent, "all waters, fisheries, &c." and the words in the fines, "*separalis piscaria*," carried the *soil*, was not the principal question; but was mooted in reference to the effect of a lease of the "*separalis piscaria*" made without deed. If the "*separalis piscaria*," were a *territorial* hereditament, including the soil, then such lease was good;—but, if "*separalis piscaria*" were merely an *incorporeal* hereditament, then a grant by deed was necessary to vest such hereditament in the lessee. In the latter case, an action of trespass brought by the Duke, as plaintiff, was well brought, but if the parol demise was good, then the action should have been brought in the name of the lessee. The Court decided that the fishery in question was not a *territorial*, but an *incorporeal* hereditament, and required a grant, by deed, to divest it from the Duke. Mr.

² See p. 55 ante.

Justice Bayley, in delivering the judgment of the Court, said, "No conveyance of the right of fishing, or of the soil, was produced at the trial, but it appeared not to be an ordinary fishing, resulting to the owner of the adjoining land in respect of the land, but a fishery in a navigable river, where the tide flows and reflows, and, therefore, in the nature of a royal franchise, which Sir William Blackstone calls a *free fishery*.³ Such a franchise could not be created, after Magna Charta, but there was evidence in this case from which its existence from time beyond legal memory, might be presumed." Then, after alluding to the words, "*separalis piscaria*," in the fines, and quoting the words of Lord Coke, as just now quoted,⁴ the learned Judge proceeds, "in the case here put, (that from Lord Coke),⁵ the grant was made by the owner of the soil, capable of granting it, and yet, a grant "*separalis piscariæ*," followed up by livery, which properly applies to a thing corporeal, *did not convey the soil*, livery being made *secundum*, &c. If then a fishery only is granted, nothing passes but a right to take the fish, and to use such means as are necessary for that purpose; which is, in truth, nothing more than a liberty to fish; the grantee has no property in the water, none in the soil. And this is a

³ 2 Com. 39.

⁴ P. 55 ante.

⁵ But Lord Coke's case was not between the flux and

reflux of the tides, or against the King, which is, therefore, a case *à fortiori*.

“ case where the grant is made between sub-
 “ ject and subject, and, consequently, is to be
 “ construed against the grantor, a principle
 “ inapplicable to grants made by the Crown,
 “ whereby nothing passes, unless the inten-
 “ tion that it should pass, is manifest.” After
 quoting the case of the river Banne, from
 Davis 55, in which there was a grant by letters
 patent from the Crown, of “ omnia castra,
 “ messuagia, &c. *piscarias, piscariones, aquas,*
 “ *aquarium cursus, &c.*” the learned Judge
 proceeds,—“ It was held that the fishery of
 “ the Banne did not pass by the grant of the
 “ land adjoining, and by general grant of all
 “ piscaries, &c. for that it was a *royal*
 “ fishery, not appurtenant to the land, but a
 “ fishery in gross, and was by itself, part of
 “ the inheritance of the Crown; and that
 “ general words by the King, would not pass
 “ such a special royalty, which belongs to the
 “ Crown by prerogative; and it was further
 “ agreed, that *the grant of the King passes*
 “ *nothing by implication.*—It was contended
 “ in argument, that the owner of a several
 “ fishery must be presumed to be owner of the
 “ soil. That *may* be true, where the terms
 “ of the grant under which he claims, are un-
 “ known, [i. e. it is presumed, where he claims
 “ by prescription,] but when they appear, and
 “ are such as convey an incorporeal heredita-
 “ ment only, the presumption is destroyed.”
 This last remark of the learned Judge, may,

however, be considered, as applied to a case between subject and subject;—not where a subject claims the soil against the *King* in right of a several fishery between the flux and reflux of the tides,—by prescription, or by “a grant the terms of which are unknown;”—for to *presume* the owner of such fishery to be owner of the soil, is taking the soil from the Crown, by a presumption not necessary. First, a grant from the Crown is presumed:—but of what? Of a separate fishery.—But such grant, if produced, would not carry the soil:—why then should the presumed grant do so? is it because the terms of it “are unknown?” This would be singular reasoning; for we know that the doubtful terms of an actual grant by the Crown, are construed strictly *in favour* of the Crown; and yet we are told that a grant, the terms of which are so much more doubtful, as to be “unknown,” may be construed most *against* the Crown. It is presumed that the words of the learned Judge, as well as of Mr. Hargrave, had reference only to “several fisheries,” in waters *not* within the flux and reflux of the tides; and even to that extent, they both seem to speak with doubt, using the phrase “may be.”

With regard to a “free fishery,” as distinguished from a “several fishery,” Mr. Hargrave remarks, in continuation of the note before quoted, “Both parts of the description

“of a ‘free fishery’ seem questionable, though,
 “for the sake of distinction it might be more
 “convenient to appropriate *free fishery* to the
 “franchise of fishing in *public* rivers, by de-
 “rivation from the Crown; and though in
 “other countries it may be so considered;
 “yet, from the language of our books, it
 “seems as if our law practice had extended
 “this kind of fishery to all streams, whether
 “private or public, neither the Register nor
 “other books professing any discrimination.
 “R. 95 b. Fitzh. N. B. 88 g. Fitzh. Abr.
 “Ass. 422. 4 E. 4. 28, 17 E. 4, 6 b, 7 a.
 “7 H. VII. 13 b. Cro. Ch. 554. 1 Ventr.
 “122. 3 Mod. 97. Carth. 285. Skinn.
 “677. Again, it is true that, in one case, the
 “Court held free fishery to import an exclu-
 “sive right, equally with several piscary,
 “chiefly relying on the writs in the Reg. 95,
 “6, and the 43 E. 3, 24. But then this was
 “only the opinion of two Judges against one,
 “who strenuously insisted that the word
 “‘libera,’ *ex vi termini*, implied ‘common,’
 “and that many judgments and precedents
 “were founded on Lord Coke’s, so constru-
 “ing it. 2 Salk. 637. Carth. 285. That
 “the dissenting Judge was not only unwar-
 “ranted in the latter part of this assertion,
 “appears from two determinations a little
 “before the case in question. See Upton
 “and Dawkins. 3 Mod. 97, and Peake and
 “Tucker, cited in Carth. 286, in marg. We

“may add to this, the three cases cited by Lord Coke as of his own time; and that there are passages in other books which favour his distinction. See Cro. Ch. 554. “17 E. 4, 6 b, 7 a. 7 H. VII. 13 b.”

The phrase “*free fishery*,” seems a technical phrase, answering to “*free warren*.” Now, one or *more* individuals may have “free warren” in another man’s land, and “free fishery” in a river of the soil of which another individual is owner. In a “free fishery,” the owner of the soil is not excluded.⁶ But, in “*separalis piscaria*,” he may be.—Thus “*separalis*” is opposed to “*libera*,” *tanquam species generali*, to show that “no one else” can share in the fishery. Thus A may prescribe for “*libera piscaria*,” in the *locus in quo*, in common with B;—and B prove that in such place, he, B, has “*separalis piscaria*,”—which excludes A; yet C may be owner of the soil. But “*separalis piscaria*” necessarily excludes C as well as A, whereas “*libera piscaria*” does not. Thus there is “*libera piscaria*,” “*separalis piscaria*,” and “*communis piscaria*,” which latter is not a *franchise* like the former, but a common right, *sui generis*. But, “*libera piscaria*” being a “franchise,” is, like “free warren,”

Distinction between *libera*, *separalis*, and *communis*, *piscaria*.

⁶ Co. Litt. 122.

⁷ See accord. 5 Burr. 2814, per Lord Mansfield, in *Seymour v. Ld. Courtney*. In that case, also, the Court

declined giving any opinion, “whether a person can have a several fishery *without* being owner of the soil.”

generally found where the soil is in another, and by no means involves, or carries with it the soil. It may be further observed, that the word "*separalis*" seems to apply peculiarly to that kind of private fishery which is carried on by means of weares, and other artificial fixed apparatus, which being the labour of the individual, cannot be used by others, and like his nets, or the moveable apparatus, are his own property. This mode of fishing was, (like the oppressive forest laws,) ever obnoxious to our ancestors, but more especially as being obstructions to commerce and navigation.

Exclusive and fixed fisheries discountenanced by the law.

From the earliest times, it was no uncommon act of the legislature, to destroy these weares and fixed fishing places, as nuisances to navigation. By Magna Charta it was declared, "*omnes Kidelli deponantur de cetero penitus per Thamaesiam et Medwayam per totam Angliam, nisi per costeram maris.*" And this statute was seconded by others that were more effectual; viz. 25 Ed. III. c. 3, 1 H. IV. 12, and 12. Ed. IV. cap. 7, and other subsequent statutes, whereby such weares and stake fisheries were abated from time to time; not only in rivers, but *along the sea coasts*. "And, by force of this last statute," says Lord Hale, "weares, which were prejudicial to the passage of vessels, were to be pulled down; and accordingly it was done, in many places."⁸ And he adds,

⁸ De jure Maris. 22.

“the exception of weares upon the *sea-coasts*,
 “[in *Magna Charta*], and likewise frequent
 “examples, some whereof are before men-
 “tioned, *make it appear*, that there might be
 “such private interest, not only in point of
 “*liberty*, but in point of *property*, on the sea-
 “coast, and below the low water mark; for
 “such were regularly all weares. But, as by
 “the statutes of 25 Ed. III. cap. 4, 45. Ed.
 “III. cap. 2. 1 H. IV. 12. 4 H. IV. cap.
 “11, and other statutes, the erecting of new
 “weares, and inhancing of old, is provided
 “against, in navigable rivers; and by other
 “statutes, particular provision is made against
 “weares new or old, erected in particular
 “ports, as in the port of Newcastle, by the
 “statute of 21 H. I. cap. 18; in the port of
 “Southampton, by the statutes of 11 H. VII.
 “cap. 5. 14 H. VIII. cap. 13; in the rivers
 “Ouse and Humber, by the statute of 23
 “H. VIII. cap. 18; in the river and port of
 “Exeter, by the statute of 31 H. VIII. cap.
 “4; in the river of Thames, by the statutes of
 “4 H. VII. cap. 15; 27 H. VIII. cap. 18;
 “5 Jac. cap. 20; and divers others; so, by
 “the statute 3 Jac. cap. 12, all new weares
 “*erected upon the sea-shore*, or in any haven,
 “harbour, or creek, or within five miles of the
 “mouth of any haven or creek, are prohibited,
 “under a penalty.”

It is further observed by the learned writer

Grant of a Several Fishery does not carry

(Lord Hale), upon the above legislative acts,
 “that they did *no way disaffirm the propriety*,
 “but only remove the annoyance; and though
 “they prohibit the thing; yet they *do admit*
 “that there may be such an interest lodged
 “in the subject, though below the low water
 “mark, whereby a subject may not only have
 “a liberty, *but a right or propriety of soil.*”⁹

No inference
 from the Sta-
 tutes against
 weares, &c.
 that such
 exclusive fish-
 eries carry the
 soil.

In reply to this, it is to be observed, that it does not appear how these statutes admit *a weare, or fishing sluice* to be sufficient evidence of a title to the soil, which is the inference intended by Lord Hale; or that the weare is any thing more than a mere fishery. They go no further than admitting the existence of such an interest, franchise, or liberty, as a “*separalis piscaria*,” in a subject, to be exercised by means of weares, &c., so that in the exercise of such right, he be careful not to injure, or interrupt other paramount general rights of the public. Not only is a separate or private fishery thus restrained; but the ownership of the soil, even in the King himself, cannot be made a ground for obstructing the subjects in general, in the navigation of the seas, or tide rivers. Whether the obstruction or nuisance be a weare, or a mere wall, it is equally a nuisance, if in prejudice of the *jus publicum*; for, as the learned author truly observes,¹ “the *jus privatum*, that is

⁹ P. 22. ¹ Ib. and see Com. Dig. Title Pleader, 3 m. 37.

“acquired to the subject by *grant, patent, or prescription*, must not prejudice the *jus publicum*, wherewith public rivers, and arms of the sea, are affected for public use.”

The frequent nuisances occasioned by the formation of weares, and fishing sluices, (attested by the numerous statutes in force against them), would warrant their being construed, *stricto jure*,² and to include nothing more than the fishery. Nor is it desirable, (in a public view), to afford to lords of manors any additional, or easier means of establishing a title to the *soil on the sea-shore*, or the creeks, or arms of the sea, or in the public rivers, than is allowed to them in regard to *terra firma* titles; especially, as such ownership is so capable of being perverted to the public annoyance.

Weares and fixed fisheries being opposed to the *jus publicum*, to be construed strictly.

There may be a difference, too, very fairly taken, betwixt the grant of a separate fishery, in rivers, streams, and lakes, which are not connected by the tides with the sea, and, therefore not subject to the “*jus publicum*,” and the grant of a separate fishery in parts of the sea, creeks, havens, or tide-rivers; which grants, being to the prejudice of public rights and benefits, are, and ought to be, more

Distinction between several fisheries in places not within the tides, and in the sea and tide-rivers.

² See *Dowell v. Sanders*, 10 Cro. Jac. 491. and *Fowler v. Sanders*, Cro. Jac. 446.

strictly construed than in cases where there are no public rights to be sacrificed.

In *Weld v. Hornby*,³ the question was whether an ancient weare heretofore constructed of wicker work and brushwood, might be converted into one of stone, and it was decided that it could not. Lord Ellenborough, C. J. said, "The erection of wares across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances. The words of Magna Charta, (ch. 23,) are, that all weares from henceforth shall be utterly pulled down by Thames and Medway, and through all England, &c. And this was followed up by subsequent acts, (vide 12 Ed. IV. c. 7,) treating them as public nuisances, forbidding the erection of new ones, or enhancing, straitening, or enlarging of those which had aforetime existed. I remember that the stalls erected in the river Eden, by the late Lord Lonsdale, and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this Court, on a motion for a new trial, to be illegal, and a public nuisance. Now here it appears that, previous to the erection of this complete stone weare, there had always been an escape for the fish

³ 7 East 191. *Weld v. Hornby*.

“ through and over the old brushwood weare,
“ in which those of the stream above had a
“ right; and it was not competent for the defend-
“ ant to bar them of it by making an impervious
“ wall of stone through which the fish could not
“ insinuate themselves, as it is well known they
“ will through a brushwood weare, and over
“ which it is in evidence that the fish could not
“ pass, except in extraordinary times of flood.
“ And however twenty years’ acquiescence may
“ bind parties whose private rights only are af-
“ fected; yet the public have an interest in the
“ suppression of public nuisances, though of
“ longer standing. No objection, however, of
“ this sort can apply to the case, where the ac-
“ tion was commenced within twenty years after
“ the complete extension of the stone weare
“ across the river, by which, it is proved, that
“ the plaintiff has been injured. Then, how-
“ ever general the words of the ancient deeds
“ may be, they are to be construed, as Lord
“ Coke says, “ by evidence of the manner in
“ which the thing has always been possessed
“ and used.” Nothing is said in this case
from which we can infer that the court consid-
ered the weare as giving title to the soil. It
is treated throughout as a mere fishery.

It will hardly be contended, that an express
grant of a “ piscaria” without more words
will pass the whole shore of a manor, which
shore *may be of several miles in extent*; and

A shore of a
manor is often
of several
miles in ex-
tent,

whilst the
weare may be
of but a few
yards.

if the express grant of it will not, why should an implied, or presumed grant do so? It is also singular law to hold, that a weare or fishing-place, which may cover only a few yards of shore, should give title to the whole shore, throughout the whole extent of the manor, which may be several miles along the coast, creek, or tide-river.

Now, if we no where find a case in point, where the right to the soil on the shore, or under the sea, or an arm thereof, or a tide river, is *solely* supported on the basis of a prescriptive right of fishery, either separate or common; and, if we find this separate fishery frequently put down by statutes, as nuisances and encroachments on the *jus publicum*;—and that these statutes no where notice the separate fishery, as conferring the soil itself, or otherwise as a mere “piscaria” and nuisance;—and if we likewise know that fisheries are, in legal title and intendment, mere franchises, and usufructuary liberties or privileges, and are, technically, a distinct species of property and ownership from the soil, and as such, founded either in express ancient grant, or on immemorial usage or prescription; we may be allowed to doubt, whether either an ancient grant of, or a prescription for, any fishery, *eo nomine*, however private, will support a title to the soil itself.

With respect to the express ancient grant, it does not appear how it could be construed to include the soil itself; for suppose the King to have granted, in some creek or arm of the sea, to W. S. the exclusive fishery thereof, by means of weares, stakes, &c., without any express words of grant of the soil itself, and the whole creek became suddenly dry land, by the permanent retreat of the waters, it would not be consistent with the received rules of construction, to construe such grant into a grant of the land. As well may it be said that the franchise of *free warren*, or even a grant of common of pasture, or of turbary, or a right of way over or in any land, is an absolute disposal of such land.⁴ It may plausibly be urged that an inclosure by means of a weare, or by stakes, &c. is a virtual appropriation of the soil within it, because no one can make use of it without breaking such inclosure. But in answer to this it may be contended, that the weare or inclosure was made for no other purpose than to catch fish; *as to the land*, the inclosure was not made *eo intuitu*. It is different from an *embankment* made expressly to secure land from the water. If the place where the weare stands should become dry land, the

An express grant of a separate fishery, and no more words, will not (it is considered) include the soil.

Distinction between weares and an embankment.

⁴ But Lord Coke tells us, "if a man grant to another to dig turves in his land, and to carry them away at his will and pleasure, the land shall *not* pass, because but

"part of the profit is given." Co. Litt. 4, b. Plowd. 154 is contra, and makes it carry the soil;—but the better opinion is with Coke.

fishery is destroyed; and that which was a lawful inclosure for catching fish, may be unlawful when used for asserting a title to grow corn there. The prescription is necessarily gone, when the subject matter of it, and the medium through which it was exercised is destroyed; when such a prescription, dependent upon the water, has ceased to exist, what is left to support a title to the dry land? The grantor of the franchise or liberty would seem to recover his exclusive dominion again.⁵ If a weare were placed on the sea-shore, still, on the recess of the tide, the soil within may be of much use for ballastage, or for manure, building materials, &c.⁶ without injury to the fishery; and what should prevent him, who granted the fishery only, from claiming all the right and uses in the soil that are not inconsistent with his

⁵ See p. 61. ante, and see Co. Litt. 4. b; and see accord. what is said per Bayley J. in a very recent case *Rex v. Montague*. 4 Barn. and Cress. 603, as to the ceasing of rights by natural causes.

⁶ See p. 61. ante, where it is said, that the owner of the soil, though he grant a separate fishery, "may take the water," and also "make profit of the soil when dry." In a recent case (*Hollis v. Goldfinch*. 1 Barnwell and Cresswell's Rep. 213,) the ownership of four *hatches* or *water sluices* made on the banks of a canal was adduced as evidence of title to

the soil of the banks; on this evidence Lord Tenterden observes, "It is said that the demise of the *hatches* imports that they belong to the lessor, and that if they do so, the bank to which those *hatches* are affixed must also belong to him; but that is a conclusion which by no means follows, because, if they were necessary for the purpose of maintaining the navigation of the river, the undertakers (of the canal) had a right to place those *hatches* there, although they might not be owners of the soil."

grant, and also the soil itself, when the fishery has ceased to exist by natural causes. Indeed, if the law acknowledge a separate fishery as a distinct species of property, and rank it amongst franchises differing essentially both in title and estate from an inheritance and title to land, it is impossible to admit that the grant in question (which is one only of the many usufructs of the sea or sea-shore) can include the land itself.³ As to prescription, the rule is, that it presupposes a grant; but no other grant can be presupposed than such as is tantamount to the fishery prescribed for; and if so, a presupposed grant of a separate fishery cannot reasonably go further than the actual grant of such fishery.

We will next proceed to consider, in their order, the several other rights, franchises, and uses which arise from, or are claimable in respect of the sea and sea-shore; because the learned writer, in the treatise³ alluded to, in order to establish his doctrine,—that the sea-shore may belong to the subject by “prescription,” as well as by charter or grant,—not only quotes the *private fishery*, but various other franchises, rights, and usufructs, the enjoyment

As to other franchises of wreck, &c.

³ In a case in 1 M. & S. 666, the *King v. Ellis, Bayley, J.* observes, “I should doubt very much if the grant of a fishery would convey the soil, and every thing underneath it, as all the minerals, though I can conceive that it might pass so much of the soil as is connected with the fishery.” As this was a fishery with *staked nets*, q. Whether the right to drive stakes for that purpose is more than an easement?

And their giving title to the soil.

of which, by a subject, will, as he concludes, support a title to the soil of portions of the sea and sea-shore. Lord Hale says, "it may not only belong to a subject, *in gross*, which possibly may suppose a grant before time of memory, but it *may* be *parcel* of a manor." "And this" says he, "it is agreed, 5 Reports, 107, Sir H. Constable's case,¹ and the

¹ The words of this case are these, "it was resolved by the whole court that the soil on which the sea flows and ebbs, sc: between the high and low water mark, *may* be *parcel* of the manor of a subject," and Dyer 326, b, is cited as accord. 2 Roll. Abr. 170 has also the same words. But this doctrine of Lord Coke may be freely admitted, without admitting that "it may be parcel of the manor," by *prescription*; Lord Coke does not in the above resolution, say *that*; the resolution in fact seems to be directed against the doctrine of the civil law writers, who hold that there can be no ownership in the "shore" at all.

The phrase "parcel of," signifies that when the subject has the shore, he has it as *pars totius*,—as he holds the rest of the lands of the manor,—and does not in any wise release him from proving it to be "parcel," by the same kind of evidence as is required for the title to all the other parcels of land in the manor. In a note to Carter v. Murcot. 4 Burr. 2165 it is said "in

¹ Sid. 149, prescription was admitted to be a title to the soil of a river, within the flux and reflux of the sea, which is a consequence from its being allowed in 5 Co. 107. 2 Roll. Abr. 170 pl. 12, that it may by *prescription* be part of a manor." But the word *prescription* is not to be found either in the resolution in 5 Co. 107, or in 2 Roll. Abr. 170 pl. 12. In Siderfin the words are, "and in this case it was repeatedly affirmed, and denied by no one, that the soil of all rivers (cy haut), where there is fluxum et refluxum, is in the King, and by no means (nemy—) in the lords of manors, sans prescription" and no authority whatever is quoted. Callis also quotes Constable's case as an authority, "that a subject's manor may extend to low water mark by *prescription*." See p. 55. Coke, however, upon his own authority, and not as giving the resolution of the court,—adds, (alluding to a case of replevin Fitz. Replev. 41.) "on which I observe three things. 1. That wreck may be

“ Book of 5 E. 3. 3. cited accordingly. And
 “ according to this was the resolution cited,
 “ Dy. 326, to be between Hammond and
 “ Digges, p. 17 Eliz;—accordingly it was de-
 “ creed in the Exchequer Chamber, p. 16.
 “ Car. inter. Attorney-General v. Sir Sam.
 “ Roll, Sir Rd. Buller, and Sir Thos. Arundell,
 “ per omnes Barones. *And the evidences to*
 “ *prove this fact are commonly these*; constant
 “ and usual fetching gravel, and sea weed, and
 “ sea sand between the high water and low
 “ water mark, and licencing others so to do;
 “ *enclosing and embanking* against the sea, and
 “ enjoyment of what is so inned; enjoyment of
 “ *wrecks*, happening upon the sands; present-
 “ ment and punishment of purprestures there,
 “ in the court of a manor; and such like;”
 and he adds, “ it not only *may* be parcel of a
 “ manor, but, *de facto*, it many times is so;
 “ and *perchance* it is parcel of almost all such
 “ manors as, by prescription, have *royal fish*,
 “ or *wrecks* within their manors. For, for
 “ the most part, wrecks and royal fish are not,
 “ and indeed cannot be well left above the
 “ high water mark, unless it be at such extra-

“ claimed by prescription,”
 [which is admitted.] 2.
 “ That forasmuch as, a ship
 “ cannot be wreck, scil:
 “ cast on the land, but be-
 “ tween the high water and
 “ and low water mark,
 “ thence it follows that *that*
 “ was parcel of the manor,”
 q. e. d., for according to

this doctrine, prescription
 for a *lesser* thing, a mere
 franchise, viz. wreck,—gives
 title to a *greater* thing, viz.
 land,—and *that* against the
 King. Besides, the conclu-
 sion is a non sequitur, for
 wreck may be cast upon the
 shore, and yet belong to one
 who has *only* the franchise.

Lord Hale's doctrine, that wreck and royal fish raise a presumption of ownership in the shore.

Pleading in Sir Henry Neville's case.

“ ordinary tides as overflow the land: but
 “ these are perquisites which happen between
 “ the high water and low water mark; for the
 “ sea withdrawing at the ebb, leaves the wreck
 “ upon the shore, and also those greater fish
 “ which come under the denomination of royal
 “ fish. He, therefore, that hath wrecks of the
 “ sea or royal fish, by prescription *infra mane-*
 “ *rium*, it is a great presumption that the shore
 “ is part of the manor, or otherwise he could
 “ not have them. And consonant to this is the
 “ pleading in Sir Henry Neville's case, 5 E. 3. 3.
 “ and Rastall's Entries, 684, transcribed out of
 “ the record, M. 14. E. 1. Rot. 432, where an
 “ Abbot, prescribing for wreck belonging to his
 “ manor, doth it in this form:—Ipseque et
 “ omnes prædecessores sui Abbates Monas-
 “ terii prædicti, et dominii ejusdem manerii,
 “ per totum tempus prædictum, habuerunt et
 “ habere consueverunt, *ratione manerii* præ-
 “ dicti, omnimodo bona *wreccata* super mare,
 “ et ut wreccum super terram projecta, per
 “ *costeram maris*, in quodam loco, ubi mare,
 “ secundum cursum suum pro tempore fluxit
 “ et refluxit, à quodam loco vocato M. in pa-
 “ rochia de L. &c.” And in the following plea
 an Abbot prescribes to have “ Wreccum maris
 “ *infra* præcinctum manerii, sive dominii sui

⁵ Mr. Hargrave, in a note to Co. Litt. 107, a. n. 115, observes upon this word, that on many occasions it

may be of importance thoroughly to understand the phrase *infra*; or, as according to classical style, it

“projectum, et Flotsan maris infra præcinctum manerii deveniens; quodque prædictum dolium vini fuit wreccum maris, per mare projectum, super littus maris apud S, infra præcinctum manerii sive dominii illius.”

We may collect, from the foregoing quotations,⁶ that the learned writer considers not only a separate fishery, wears, stakes, &c. but also a right to royal fish, to wrecks, to flotsan, jetsan, and ligan, and lastly, a usage to dig and carry away sand, sea weed, &c., or to make embankments and inclosures of portions of the shore, may all be adduced (by prescription) in support of a title to the land or soil of the shore itself.⁷ He does not say that *all* these are necessary together: we may infer, indeed, from his language, that *all* of them are *not* necessary to raise an absolute title to the ownership of the sea shore itself; but he does not inform us whether any one, or more of them will suffice, or which of them is *essential*.

Comments on such doctrine.

ought to be *intra*; and he construes *infra* quatuor maria to mean *intra* quatuor maria. In like manner, in the abbot's plea, *infra* was used for *intra*, although *infra* præcinctum manerii means, according to ordinary construction, *below*, and not *within* the precincts of the manor. Lord Coke uses the word *intra*, and not *infra*. “*Intra* quatuor ma-

ria,” within the four seas; “*extra* quatuor maria,” *beyond* the four seas. 260 b. Co. sup. Litt. But in his third Inst. 113, he uses the phrase “*infra* corpus comitatus” for “*intra* corpus comitatus;” and in Constable's case he uses “*infra* præcinct. manerii” for “*intra*.”

⁶ See also Mr. Butler's N. to Co. Litt. page 32, ante.

⁷ De Jure Maris, p. 25.

Royal fish.

Now, with regard to the franchise of royal fish, (which are whale, sturgeon, and porpoise,) this is reckoned by Blackstone,⁸ *inter regalia*, and one of the King's ordinary branches of revenue, and one of the flowers of the Crown. Those fish are claimed on account of "their superior excellence," according to Blackstone, who vouches for the royal taste, not in right of the sea shore, but by royal prerogative, and from the most remote antiquity. Whether thrown on shore, or caught in the sea, or on the coast, they are the property of the King, not of the catcher, even in a private fishery.⁹

Wreck.

In like manner wreck, (when no owner can be found,) is part of the King's ordinary revenue, in right of his royal prerogative, and is a flower of the Crown. So also flotsan, jetsan, and ligan, are perquisites of the Crown. These royal rights and franchises are *not* claimed by the Crown as part of or appurtenant to the *ownership* of the sea shore, nor enjoyed in virtue of such ownership. They belong to the Crown in virtue of the *royal prerogative*.¹ They are regarded as "*nullius bona*," and allotted to the King by the law, for want of other ownership. The King might grant them, or any one of them, to a subject,

Flotsan, &c.

⁸ Blackstone's Com. vol. i. p. 289, 13th ed.

⁹ Black. vol. i, p. 290.

¹ Bracton. 2 Vent. 188, and 5 Co. 108. Constable's case.

without any grant of the shore.² So, he might grant the wreck to one person, and royal fish to another, and the shore itself to a third person.³ There are not wanting instances where lords of manors on the coast are possessed of, and can prescribe for, *both* these royal franchises, or but *one* of them, and yet have never had or claimed the ownership of the shore itself.

All or any of these rights may be and often are held without any right to the shore.

Wreck or royal fish are no part of the realty; they may indeed be prescribed for by the lord of the adjacent manor, and may be and commonly are attached as franchises to the *manors* on the sea coast; but still they are prescribed for on the ground of immemorial usage, or are proved by express grant, and are not claimed in right of (*ratione*) the ownership of the sea shore. It is no where said, nor could it be intended, that a mere grant of so many acres of sea shore, or sea bottom from the King, would pass, *inclusive*, the royal franchises of wreck and royal fish; and yet these might seem to be more reasonably attached to the shore than the shore attached to them; and if the rule "*accessorium non ducit sed sequitur suum principale*" be applicable at all, it were much more reasonable to hold that the ownership of the soil is evidence of the franchises before mentioned, (which, however, it is not,) than that these

These rights are no part of the realty.

A grant of so much shore by the King, and no more words, will not pass wreck, &c.

² And see *Scrutton v. Browne*, ante 14.

³ 6 Mod. R. 149.

rights, or any of them, are proof of title to the shore. It is difficult to conceive how all or any one of these rights, together or separate, can confer a different title to a different thing, viz. the soil. I may obtain the royal fish from the King, and wreck from another man to whom the King once granted it; I may *prescribe* for my title to one, and produce an express *grant* of the other, and yet the soil of the shore remain where it was.⁴ I may prescribe for all these rights, but that is not prescribing for or proving another right; each right must be supported on its own title; nor does it appear why the prescribing for wreck should confer a title to the soil, more than prescribing for wreck should confer a title to a separate fishery, or to royal fish, which clearly it will not do.

Wreck implies egress and regress to get it, but not the right to the shore itself.

As to the observation that “a right to wreck or to royal fish cannot be well had above high water mark, for the sea withdrawing at the ebb, leaves the wreck or royal fish upon the shore, and consequently that he who hath wreck of the sea, or royal fish, by prescription, *infra manerium*, it is a *great presumption* that the shore is part of the manor, as otherwise he could not have them,”⁵—it may be replied, that this does not seem to be a *necessary* consequence; for wreck, or royal fish, may clearly be granted,

⁴ See p. 20 ante.

⁵ Constable's case, 5 Co. cited ante. De Jure Maris, 27.

per se, *without* the shore; so far as the shore is essential to the enjoyment of the franchise, it will be subject to egress and regress for that purpose;⁶ nor does it appear what should prevent the grantee from claiming the wreck, or royal fish, although the shore may remain with the King; it is not *necessary*, in order to make the grant of wreck perfect, that more should be conceded than egress and regress.

Now, if it be not *necessary*, that in order to enjoy the wreck, the grantee should be owner of the soil of the shore, no *presumption* necessarily follows that he is such owner. If I have common of pasture upon the waste lands of a manor, I must go upon the waste for the purpose of pasturing my cattle, and yet no presumption of ownership of the soil is raised on that account. The pleadings in Neville's case,⁷ quoted by the learned writer, do not set up any title to the shore. Sir H. Neville merely claims wreck, *ratione manerii*, i. e. wreck in right of, or as appurtenant to the *manor*, and passing with the manor into the hands of all owners for the time being of the manor, but nothing is said as asserting a claim to the shore, *ratione wrecci*.

The other authority, of the abbot's plea,⁸ assumes the wreck and flotsan to be *infra*, or (according to Mr. Hargrave) *intra præcinc-*
The abbot's plea considered.

⁶ 6 Mod. R. 142

⁷ P. 84, ante.

⁸ P. 84 ante.

tum manerii, and it asserts the “*dolium vini*” to have been cast “*super littus maris, apud S. infra præinctum manerii sive dominii illius.*”^o It may be agreed that the Abbot considered the shore, as within the precincts; although the next antecedent is the locus in quo, viz. S.—which *locus* the plea states to be *within* the manor. But admitting the plea to intend that the shore, as well as the place S., was within the precincts, yet he was not prescribing for or claiming a title to any thing else but wreck and flotsan; *and he certainly did not claim or prescribe for the shore in virtue of his title to the wreck.* The shore might or might not be his, and within the boundary of his manor;¹ but nothing appears to show *that it was his because the wreck was his*; or that his prescription for the wreck was *allowed* evidence of a title to the shore; the shore was not in dispute at all. The form of plea, in both these cases, does not show a title to the shore in right of the wreck. Nor is it *necessary* to show a title to the shore, in order to prove a title to wreck.

It is proper here to notice a case, which is cited at considerable length in the treatise ascribed to Lord Hale,² and which appears to be the only case cited by him from which the doctrine now under consideration seems to derive any material support. The learned

^o See p. 85 ante.

¹ See accord. p. 19 ante.

² De Jure Maris, p. 34.

writer quotes it as a case with the decision of which he was personally familiar. "In Scac-
 cario, Car. upon the prosecution of Sir Sackville Crow, there was an information against Mr. John Smith, farmer of the Lord Barclay, setting forth that the river of the Severn was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Gloucester and Bristol, and that the river had left about 300 acres of ground, near *Skinbridge*, and therefore they belonged to the King, by his prerogative. Upon not guilty pleaded, the trial was at the Exchequer bar, and by a very substantial jury of gentry and others of great value."

Case of Barons
 of Barclay for
 the soil of the
 river Severn.

"Upon the evidence," proceeds his Lordship, "it did appear, from unquestionable proof, that Severn, in the place in question, was an arm of the sea, flowed and reflowed with salt water; was within and part of the ports of Bristol and Gloucester; and that within time of memory these were lands newly gained and inned from the Severn; and that *the very channel of the river did, within the time of memory, run in that very place where the land in question lies*; and that the Severn had *deserted it*, and the channel did then run about a mile towards the west."

³In 1 Mod. 106. Hale, "there are particular re-
 Ch. J. says, "In the Severn "straints, as *gurgites*, &c.,

On the other side, the defendant, claiming under the title of the Lord Barclay, alleged these matters, whereupon to ground his defence, viz.

“ 1st. That the barons of Barclay were, from the time of Henry the 2d, owners of the great manor of Barclay”

Q. e. d.

“ 2d. That the river of the Severn, usque filum aquæ, was, time out of memory, *parcel* of that manor.”

“ 3d. That, by the *constant custom of the country*, the *filum aquæ* of the river of Severn was the common *boundary* of the manors on either side of the river.”

“ When the state of the evidence was opened, it was insisted upon that the river in question was an arm of the sea, a royal river,⁴ and a member of the King's port, and therefore lay *not in prescription to be part of a manor*. But the Court overruled that exception, and admitted that even such a river, though it be the King's in point of interest, *prima facie*, yet it may be by *pre-*

“ but the soil belongs to the lord on either side, and a *special sort of fishery* belongs to him likewise, but the common sort of fishery is common to all.”—And

in some other place the Severn is said to be “an unruly river,” often changing its channel.

⁴ So of the Thames. See Doug. 441.

scription and usage time out of mind parcel of a manor."

"Thereupon the defendant went to the proofs, and insisted upon many *badges* of property or ownership, as (*viz.*)"

"That the lords of the manors adjacent to this river, and particularly those of that manor, had *royal fish*, taken within the river opposite to their manors usque filum aquæ."

"That they had the sole right of salmon fishing."

"That they had all wrecks cast between high-water and low-water mark."

"That the lords of the manors adjacent had ancient *rocks* or fishing places, and *wears*, or such as were of that nature, within the very channel."

"That they had from time to time granted these fishing places, some by lease, some by copy of court roll, at their several manors, by the names of "*rocks*," *wears*, *statches*, *bo-raches*, *putts*,⁵ and that they were constantly

⁵ These four last are all *artificial* apparatus for taking the fish, as their names import. Gorges, which is sometimes translated "weare,"

is a *natural* formation in the river, and, by Lord Coke, is said to be "a deep pit of water, a gors, or gulfe, and consisteth of water

enjoyed, and rent paid by those copyholders and leaseholders."

"That by common tradition and *reputation* the manors on either side Severn were *bounded* one against another by the *filum aquæ*, and divers *ancient depositions* produced, wherein it was accordingly *sworn by very many ancient witnesses*."

"That the increases happening by the reliction of the river were constantly enjoyed by the lords adjacent."

"and LAND, and by that "name the soil shall pass." Co. Litt. 5 b. He takes no notice of "weares," as a fishery, nor of the *other* words in the text. Callis, 255, 6, tells us, that the "kiddelli," mentioned in Magna Charta, are "weares," and yet, by stat. 25 Edw. 3, c. 4. "all mills, *weares*, stanks, stakes, and *kiddels* which "were set in the time of "King Edward, (grandfather of Edw. 3d), and "after, whereby ships and boats were disturbed, should be *pulled down*." In stat. 12 Henry 4th, weares and fishgarths are mentioned together as nuisances, and in a case Benedict Hall v. Mason, quoted by Callis, 252, a weare and fishguard are put together, and mentioned as "having been letten by the late Queen

(Eliz.) at yearly rents, with "the profits of fishing." This weare, which was stated to have been built of *timber and stone*, was demolished as a nuisance. According to Plowd. 154. "by the "grant of a *pool*, the soil "and *wear* shall pass, because it is included in the "word; for by one book a "formedon lies de *gurgite*." Here the "soil" and "wear" are distinguished.* Ld. Coke, however, translates "stagnum, a pool," and "gurgis, a deep pit of water," but says nothing of the weare, which, in fact, may be constructed in a marsh or lake, stagnum (pool), gurgis (pit of water), or in the river course, or on the sea-shore. So, the word "sea-grounds" will, it seems, pass a portion of sea-shore.—Scrutton v. Brown, ub. sup.

* Co. Litt. 5.

“These,” says the learned writer, “and
“many other *badges*, were opened, and were
“most effectually made good by most authen-
“tical evidences and witnesses. But before
“the defendant had gone through one half
“of his evidence, the Court, and the King’s
“Attorney General, Sir John Banks, and the
“rest of the King’s Counsel, were so well
“satisfied with the defendant’s title, that
“they moved the defendant to consent to
“withdraw a juror, which, though he were
“very unwilling, yet, at the earnest desire
“of the Court and the King’s Counsel, he
“did agree thereunto. So that matter rested
“in peace, and the lands, being of the yearly
“value of £200 and better, are enjoyed by
“the Lord Barclay and his farmers, quietly,
“and without the least pretence of question,
“to this day.”

By this report of the case it is made to ap-
pear, that the Court declared that the soil of
such a river, (i. e. the Severn, a tide river and
arm of the sea,) may, by *prescription* and usage
time out of mind, be parcel of a manor. No
grant whatever of the soil of the river to the
Barons, *appears* to have been produced on the
trial. The great manor of Barclay, as it would
seem, was *admitted* to belong to the Barons;
the title to the *manor*, therefore, was not dis-
puted: the true question was, whether such
manor comprised or included within its limits

Comments on
the case of the
Barons of Bar-
clay.

the soil of the river or not. Now this was a mere question of *boundaries* of a manor, the ownership of which was not disputed. This manor was *asserted* to extend usque *filum aque*; and whether it did or did not extend so far, was the question. Two distinct kinds of evidence were adduced to prove a title to the soil; the first kind was that which has been just now controverted; viz. that the Barons, owners of the manor, had immemorially enjoyed the franchises and liberties of wreck, royal fish, and separate fisheries, by wears, borachiaë, &c. The other kind of evidence was such as has, in later times been admitted to support titles to inland estates; viz. *copyhold grants*,⁶ *leases*, and taking rent, &c., surveys, records, terriers, and evidence of old witnesses, and ancient depositions to the *boundaries* of the manor.⁷ These, in the absence of the grant, are admitted as evidence of boundaries to inland estate. But mere reputation, or common tradition, will not alone, it is conceived, be sufficient to support a title to the freehold.⁸ So, perhaps, the evidence to the custom of

⁶ See 2 T. R. 53. 4 T. R. 514. 669. 10 East, 206. 14 East, 331, u. 2 Roll, ab. 186. pl. 5.

⁷ 1, Maule & Sel. 81. & 687, 689. Doe v. Thomas, 14 East, 323.

⁸ See p. 42 ante, and the cases to Appendix in Peake's Evid. 30. Nor does the

question, as to what kind of evidence shall be admitted to prove the "boundaries of a manor," or that a particular close is part of an estate, appear yet to be fully settled. See also Phillipp's Evidence, vol. i. p. 249 and 251.

the country, as to *boundaries*, "affecting a whole district of manors," may have been good evidence in this case.⁹ The custom, however, of one *manor* is not evidence of the custom of *another*.¹⁰

It is admitted, that a man may be owner of a definite tract of sea, or river, if it be capable of demarcation; but yet the required evidence of the boundary line,¹ whether of old *terra firma*, or of land covered with water, is legally and technically stricter than when an easement is claimed by prescription, founded on usage. If it be admitted, (as it was in the principal case,) that a man is owner of the Great Manor of B, such manor must have its boundaries and limits, both on the land side and on the water; and it is competent for me to prove, by evidence, those limits, and witnesses are in such case admissible evidence. Lord Hale tells us, (cap. 6.) "That the shore may not only be "parcel of a manor, but also of a vill or parish; and the evidence for that will be, "usual *perambulations, common reputation*,² "known *metes and divisions, and the like*." Now all this is evidence to *boundaries*; but

⁹ 1, Maul & Sel. 662, per Ld. Ellenborough.

¹⁰ D. of Somerset v. France, 1 Strah. 658, and cases cited in *Phillips's Ev.* 162.

¹ It is the practice to "beacon out" the limits of

appropriated portions of shore, or sea-grounds; and these "beacons" are evidences of boundaries. See *Scratton v. Brown* ub. sup.

² But see p. 42, ante.

‘wreck’ or ‘a fishery’ is no evidence to boundaries.”

The evidence ought to establish such acts, on the part of the claimant and his ancestors, as far back as the statutes of limitation require, as are in their nature the most effectual for acquiring and retaining the *possession* of the land. These acts must be *eo intuitu*, having for their express and manifest object the seisin and possession of it. These acts must also have been *continued* for the time required by the statutes of limitation. At the time the foregoing case was tried, the ancient time of Richard I. was the period of limitation, and it is expressly stated, that the Barons of Barclay had held the manor from the time of Richard I., *nor was this controverted*. The evidence went to prove that, during all the time they were lords of the manor, the Barons had made a series of copyhold grants of various portions of the disputed soil, and leases also, which were overt acts³ of ownership; and the evidence as to boundaries went as far back as living testimony could go.

We are not informed what part of the evidence adduced in this case prevailed most with the Court; we know which would do so in a case of inland title at the present day;

³ See accord, Rogers, and 309; and see 5 T. R. 412. others, v. Allen, 1 Camp.

and our object is, to separate from this mass of evidence that which was valid from that which was not.

This case, indeed, presents a precedent for those to follow, who, without a grant, have to make good a similar claim; for every kind of evidence (except the "taking sand") which could give colour of title to the soil was amassed upon the trial; but it does not inform us whether *all* this evidence was *necessary*, or if not all, what part of it was essential in establishing the title to the bed of the river.⁴ In other cases, therefore, where but one, two, or three of these proofs are adduced, we are left to the principles of the common law to determine whether such proof be legal evidence or not; as, for instance, whether wreck, or royal fish, (and on the sea-coasts these are the most common attributes of manors), will alone, without more substantial evidence, support a title to the sea-shore, or to soil under the sea.

With regard to *terra firma*, there is no difficulty as to the nature of the *acts* required to testify seizin and possession. These are such as occupation, and taking possession or seizin, inclosing, letting⁵ and taking rent, cultivating and making profit of the soil, land-

Nature of the Acts required to give title to *terra firma*.

⁴ But see Lord Ellenborough's comments on this case in the King v. Ellis. 1 M. & S. 662.

⁵ But see Tyrwhitt v. Wynn, 2 Barn. & Ald. 554.

marks, perambulations, and other acts which savour of *ownership*, i. e. which common sense acknowledges as acts of appropriation and occupation, and which naturally flow from continued and exclusive possession; and these acts must have continued for the period required by the statutes of limitation.

It may be a question what other acts, besides those just noticed, shall be said to attest an appropriation and personal possession of the soil under the water, in a tract of sea or sea-shore, whilst it continues sea or sea-shore. There must be something in the acts themselves evidencing the “*animus habendi, possidendi, et appropriandi*,”—not the usufruct of the water merely,—*but of the soil itself under it*. The acts of ownership must not be more appropriate to the *water* than to the *land*. They ought to savour of the land itself, and be the natural result of the personal and exclusive occupation of the soil itself. The *animus piscandi*, or *wreccum capiendi*, is not *animus solum appropriandi*. Acts of fishing, continually used, do at last establish a *right* to fish in future; and this is embodied by our law into a “fishery,” a technical and distinct species of property and ownership. Why should those acts go further? That which those acts savoured most of they were allowed to give a title to, viz. a fishery; and by the same reasoning, that only which savoured

most of the soil, ought to give a title to that soil; that which savours most of one kind of property and ownership, can hardly be said to savour most of another kind of property and ownership. The usufruct of the water vanishes with the water,⁶ and where both usufruct and water are gone, it seems singular to construe such usufructuary right, now no more, into proof of a new species of ownership in the land, and *that* in derogation and to the ousting of the King's original property in such land.

With regard to the "constant and usual ^{Digging for sand, &c.} fetching of sea-sand, sea-weed, and gravel, between the high-water and low-water mark, and licensing others so to do; and embanking against the sea, and enjoyment of what is so inned;" these, it must be admitted, are all acts likely to be done by the owner of the soil; and they afford colour, that he who does these acts is such owner: but these acts *may* be usurpations or intrusions on the King's ownership, and *prima facie* are so.

As to the right of digging for sand, the authorities show that this may, and often does exist, without conferring any title whatever to the land; for similar rights are exercised by the tenants in the wastes of a lord's manor, and yet the tenants have no title

⁶ See 4 Rep. 88. and Co. Litt. 4. b.

to the soil; but such rights are mere profits *à prendre*.

A custom to dig sand or sea-weed is analogous to the customary right of digging turf, or brick earth, or sand, or coal, or minerals, in the waste lands of a manor, by the customary tenants. Such custom is good, but it does not raise any title to the land; it is a mere usufructuary liberty, or right of commonage in the lord's waste, supported by express grant, or by usage and prescription. It further appears, that a single individual may possess similar rights, exclusive of all others, *in alieno solo*.⁷ But if this be so, then it would seem that a custom (local at least) to dig sand or sea-weed in the great waste of the shore might be prescribed for, (as in the analogous cases,) without its conferring a title to the shore itself. The statute of 7 James I. ch. 18. after reciting or

Statute of 7
Jac. I. ch. 18.
in favour of
taking sand
on the shore
in Devon and
Cornwall.

taking notice that, "Whereas the sea-sand, "by *long trial and experience*, hath been "found to be very profitable for the bettering

⁷ "If a man *grant* to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not pass, because but part of the profit is given." Co. Litt. 4. b. So "If a man *prescribe* or allege a custom to have and enjoy *solam vesturam terræ*, from such a day to

"such a day, hereby the "owner of the soil shall be "excluded to pasture or feed "there: so he may *prescribe* "to have *separalem pasturam*, or *separalem piscariam*, and exclude the "owner of the soil from *pasturing* or *fishing* there." Co. Litt. 122. a.

“ of land, and especially for the increase of
“ corn and tillage within the counties of Devon
“ and Cornwall, where the most part of the in-
“ habitants have not *commonly* used any *other*
“ manure for the bettering of their arable
“ grounds and pastures; notwithstanding di-
“ vers having *lands adjoining* to the sea-coast
“ there, have of late interrupted the bargemen
“ and such others as have used of their *free*
“ *wills and pleasures* to fetch the said sea-
“ sand, to take the same *under the full sea-*
“ *mark*, as they have *heretofore used to do*,
“ unless they make composition with them at
“ such rates as they themselves set down,
“ though they have very small or no damage
“ or loss thereby, to the great decay and hin-
“ derance of husbandry and tillage, within the
“ said counties;”—enacts—“ That it shall
“ and may be lawful to, and for *all persons*
“ *whatsoever resident and dwelling* within the
“ said counties of Devon and Cornwall, to
“ fetch and take sea-sand at all places un-
“ der the full sea-mark, where the same is or
“ shall be cast by the sea, for the bettering of
“ their land, and for the increase of corn and
“ tillage, at their wills and pleasures. II.
“ And that it shall and may be also lawful to
“ and for all bargemen and boatmen, and all
“ other carriers of sea-sand of the said coun-
“ ties, that shall fetch or take sand as aforesaid,
“ *to land and cast* out of their boats and barges

“ such sand as they shall so fetch or take at
 “ *such places* as sand hath at any time within
 “ the space of fifty years last past been used
 “ by such bargemen and boatmen *to be landed*
 “ *and cast* ; and also to fetch and carry the
 “ same by and through such ways as now
 “ be and by the space of twenty years last past
 “ have been used for the carrying and fetching
 “ thereof, paying for the taking, casting out
 “ and landing of every barge-load, boat-load,
 “ or sack of the said sand *upon the grounds of*
 “ *any man*, such duties as heretofore, within
 “ the said time of fifty years, have been used
 “ and accustomed to be paid for the same, and
 “ for passage by and through the *said ways*,
 “ such duties as have usually been paid by the
 “ space of twenty years, and in such manner
 “ and form as the same, within the said seve-
 “ ral times, have respectively been used and
 “ accustomed to be paid. And in such places
 “ where certain usual duties have not been
 “ paid, but uncertain compositions have from
 “ time to time been made by agreement with
 “ the owner of the soil there, to yield such
 “ reasonable compositions as, by agreement
 “ with the said owners, shall from time to time
 “ be made.”

This statute raises an inference against the
 presumption that the mere digging of sand, &c.
 may entitle either lords of manors or others to

the *soil* of the sea-shore; for, by this statute, Comments on the statute. the sea-shore, throughout two of the largest maritime counties in England, is declared to be, and to have been heretofore *commonly* open to the spades and mattocks of all the *inhabitants* of those large counties. Now, if the lords of manors were actually entitled to the sea-shore in this district, the statute was unusually arbitrary, even in that arbitrary reign. But the statute does not take notice of any *ownership* of the lords of the manors; it states these lords, or rather "owners of lands adjoining," to have interrupted bargemen and others as *had used*, of their free wills and pleasures, to fetch sea-sand, and take the same under the full sea-mark, *as they had theretofore used to do*;⁸ and without noticing or regarding any owner-

⁸ Lord Hale, (p. 26.) draws the following inference from the statute. He says, "This (the shore) *may* belong to a subject. The statute, 7 James, cap. 18, supposeth it, for it provides that those of Devon and Cornwall may fetch sea-sand, for the bettering of their lands, and shall not be hindered by those who have their lands *adjoining the sea-coast*, which appears by the statute, they *could not formerly*." But the words of the statute, expressly state, "That by long trial and experience it had been profitable for the bettering of land;" and that "most part

"of the *inhabitants* had not *commonly* used any other;" and "that they had been of late prevented from doing what they had been *used* to do at their free wills and pleasures," and "what they had *heretofore* used to do." So that it appears by the statute that they *could* do so formerly. The statute is directed mainly against the owners of "lands *adjoining to the coast*," and no sound inference is afforded by it, against the King, in favour of the right of the lords of manors of Devon and Cornwall to the sea-shore.

ship of the lords or others in the shore, enacts that *all* persons in the said counties should be at liberty, as theretofore, to take sea-sand at all places under the full sea-mark.

In the case of *Bagott v. Orr*⁹ it was disputed at the bar, whether this statute was merely *declaratory* of the general right of the subject throughout the coasts of England, or an *enacting* of a *special* and peculiar privilege for the men of Devon and Cornwall, but the Court gave no opinion on the point. There was nothing in the privilege or benefit itself which peculiarly applied to the inhabitants of those counties; it was equally likely to be claimed and used in Sussex or Norfolk, and probably, had the other maritime counties made the same complaint of prevention, the same remedy would have been obtained. It is a right which is most likely to have grown up and been exercised in all maritime districts, immemorially, in like manner as the free fishery has been enjoyed. There are other instances where *general* rights *have* been confirmed to particular places, by special statute.

At all events, it is certain, from the foregoing statute, that such right to dig, &c. may be claimed and enjoyed by thousands who have no ownership in the soil itself; and it also appears that one person may enjoy such

⁹ 2 Boss. and Pul. 472.

right exclusive of all others, even of the admitted owner of the soil himself; and, if so, then such right exercised in the *shore*, does not *necessarily* involve title to such shore. In Devon and Cornwall an exclusive right to dig sand or weed on the shore, or to license others so to do, cannot now be set up by lords of manors; nor do the men of those counties stand in need of any licence other than the statute.

Admitting that an exclusive right of digging sand, &c. on the shore, may be exercised by some lords of manors; still it is necessary to *prove* such right, in the first instance, if it is to be used as a ground of title to the shore. Such right can only be proved two manner of ways—1st. By express grant exclusively to dig, &c. 2nd. By prescription or custom. As to an express grant of right to dig sand, &c. Now, if we take a manor extending along *several miles* of sea-shore, such shore belonging clearly to the King, and he, by express grant, give to the lord of the manor a right to dig sea-sand, *without more words*, it would be strange to construe this into a grant of the whole of these several miles of sea-shore; and, if so, it would be still more strange to construe a prescriptive right or custom, (i. e. one grown up by usage and encroachment,) more liberally than the King's express grants, and beyond the terms even of the prescription. Every argument, indeed, which has

Prescription
ought not to
have larger
effect than an
express grant
of the right
prescribed for
would have.

been already applied to a several fishery, will equally apply to an exclusive privilege of digging sand, to shew that prescription for a mere liberty, profit, or privilege, is no title to land. The shore *may* be subject to a general or to a local right, claimed by others than the owners of the soil, of digging shells or sand, as well as to a right of fishing, or it may *not* be so subject; if no such general or local custom can be established, the ownership of the soil,—whether vested in the King, or in a subject by grant from him,—is *entire*; but if such custom or usage be established, then one usufruct of the ownership, and no more, is detracted from it.

The lord of a manor claiming such profit *à prendre* out of the shore, might be considered in the same situation, in regard to the King, his lord paramount, as a copyhold tenant is in regard to the lord of the waste of a manor; and therefore, it is conceived, the right to dig gravel, &c. may exist as privilege in the lord, without carrying the ownership of the soil, as well as in a copyholder or freeholder without carrying the soil. If indeed such right were *prescribed* for by the lord, as a profit *à prendre* in the shore, the title to the soil of the shore would seem to be excluded by the very terms; for the ownership of the land is more than a mere privilege, or usage, or profit *à prendre*.

With regard to the acts of the lord of a manor, or other owner of the old adjoining *terra firma*, in “embanking” against the sea or a tide river, and enjoying what is so inned, and making grants to do the same, it is impossible, it must be owned, to construe this into a mere profit *à prendre*, like the digging for gravel, &c.; for it is a positive and exclusive entry upon and taking possession of the land. Where no *grant* to the lord exists, such an act is an “intrusion” upon the King’s *prima facie* title; and looking at such act *per se*, it would seem singular to construe an intrusion upon *one* piece of another man’s land into evidence of a right to seize upon other parts of it, and even into evidence of title to that which has not yet been, but is liable to be intruded upon.

Embanking
and its evi-
dence of title
to the shore.

But, in point of fact, the question, in this case, would seem to be one of *boundaries*. The title to the adjacent *terra firma* being admitted to belong to the claimant, the inquiry is directed to the boundary-line sea-ward. Acts of ownership down to the low-water mark are admissible evidence to carry the boundary-line so far. The *law* has fixed the high-water mark as the boundary, unless the contrary be shewn; but the contrary *may* be shewn.

Thus if a series of “intakings,” by the lord

of the manor and his predecessors, or their grantees, should be proved, and although anciently and frequently exercised and repeated, should have been uniformly acquiesced in by the crown;—and such intakings and grants should be regularly entered upon the court rolls of the manor, (accompanied by the jurisdiction of “presentment and punishment of *purprestures*”² i. e. of inclosures attempted by others), a presumption is said to arise in favour of the lord’s title to the *whole* shore, down to *low-water* mark,—in proportion as these evidences are numerous, extensive, and unequivocal. These acts assert and involve the whole *seizin* and ownership, and not one profit only, like sand-digging. A presumption, therefore, if made at all, must confer a title akin to that involved or assumed by the acts on which it is raised. The *seizin* of the rest of the shore shall, it is said, be *presumed* from the repeated *seizin* taken of specific parts; so as to carry the boundary-line from that which bounds the *terra firma*, to that which bounds the *shore*. In such case, it is not the lapse of time which raises the presumption, but the acts of the party, and the acquiescence of the *prima facie* owner.

² Query, whether the proof of jurisdiction to present and punish *purprestures* on the shore, in the Lord’s Court, may not be deemed very decisive evidence of

ownership of the shore. *Purprestures* are unlawful inclosures, and the right to put down and punish them, seems strong evidence of ownership in the *locus in quo*.

It might, perhaps, be thought that these "intakings" should be left to their own limits, and to stand or fall by their several titles, without adding the whole shore to them. For the principle which dictates these kind of presumptions is, the quieting possessions,—a principle not very applicable to the case in question, where a large extent of shore, never yet reduced to possession, but daily under the dominion of the sea, is thus presumed to belong to *him* who has neither possession nor grant to plead. But it appears, that this kind of evidence in regard to boundaries is admitted in some cases of *inland* title, as well as in titles to the sea-shore.

The recent case of *Hollis v. Goldfinch*³ turns partly upon this point. It was there contended, that certain acts of ownership exercised by proprietors of canal shares on *other* parts of the bank of the canal, were evidence of ownership of a particular spot in question. The Court, indeed, there held, "that the plaintiff was *not* "at liberty to go into evidence of the exercise of acts of ownership "on *other* parts of the bank, but ought to "have been confined to evidence of acts done "on the *particular spot in question*." See also *Tyrwhitt v. Wynn*, 2 B. & Ald, 554. But Mr. Justice Bayley's comment, in *Hollis v.*

³ *Hollis v. Goldfinch*, 1 Barn. and Cress. 205.

Goldfinch, on another case (*Stanley v. White*, 14 East, 332), would seem to draw a distinction as to the cases in which such evidence *aliunde* shall or shall not be admitted. "In all those cases," observes the learned Judge, (Bayley,) "where evidence of acts done in one spot have been held admissible, in order to show a right in another spot, a reasonable probability has been previously made out, that the whole land had been formerly in one owner, and had been all subject to one and the same burden. The decided cases proceed on the ground of *unity of ownership or character* between the spot in question, and other places with respect to which the acts of ownership given in evidence are adduced. Now, in the present case, there was no such unity of ownership or character established, *for the acts of ownership are exercised on different parts of a bank of a new cut which, in all probability, passed through the lands of many different persons.*" Mr. Justice Best also said, "The question between the parties in this case was, to whom the right of soil in the bank belonged? Now how was that question to be decided? In the first place by title deeds, which must clearly relate to the *locus in quo*, or no inference whatever can be drawn from them. If title deeds cannot be produced, the next best evidence is pos-

“ session ; but then it will be the possession
“ of the *locus in quo*. In this case there was
“ no evidence of possession. The only other
“ evidence must be acts of ownership :’ now
“ acts of ownership can only prove that which
“ would be better proved by title deeds or
“ possession. Acts of ownership, when sub-
“ mitted to, are analogous to admissions or
“ declarations by the party submitting to them,
“ that the party exercising them has a right so
“ to do, and that he is therefore the owner of
“ the property upon which they are exercised.
“ The declaration of A, who is in possession
“ of land, that B is the owner of that land, is
“ evidence in favour of B and against A, as
“ to that particular portion of land ; but it is
“ no evidence that B is the owner of the ad-
“ joining land, which is occupied by another
“ person, unless, indeed, A and the holders
“ of the adjoining land all held by one and
“ the same title. Generally speaking, there-
“ fore, acts of ownership submitted to by the
“ holders of one portion of land cannot be
“ any evidence that the person exercising

³ i. e. Acts of ownership manifesting the animus possidendi, of the *locus* itself, and not a mere *animus* of taking or using some one particular profit, or easement. *Actu externo opus est, unde occupatio potest intelligi.* Seld. Mar. Clau.

lib. 2. cap. 2.—“*Usus*” et “*occupatio*” are not the same, as profits à *prendre* show;—the “*usus*,” if it have the import of “*occupatio*” or “*possessio*,” must imply the usufruct in an absolute exclusive sense.

“ them has any right to the adjoining land.
 “ Besides, one landholder might, from good-
 “ nature or other causes, permit acts which
 “ others would refuse; or he might lose his
 “ rights by negligence. It would be ex-
 “ tremely hard, therefore, to construe the im-
 “ plied acknowledgment, arising from acts of
 “ ownership exercised over the lands of A, to
 “ be received as evidence of an acknowledg-
 “ ment of a similar right over the land of B,
 “ who has never submitted to any acts of the
 “ kind.”⁴ The above doctrine of the learned
 Judge (Bayley) seems to apply strongly to the
 acts of ownership alluded to in the shore of a
 manor; and it may be concluded that embank-
 ments, and intakings of portions of the shore,
 immemorially, repeatedly, and uninterruptedly
 exercised by the lord, or his grantees, will
 establish a presumption in favour of the lord,
 against the Crown. But it is not to be for-
 gotten, that as the King's grants are always
 construed strictly, so presumptions of this
 kind are only to be admitted against the
 Crown on strong evidence, more especially in
 a case in which public utility sides with the
 Crown, as, indeed, is always assumed.

The King's
 grants con-
 strued stricto
 jure.

Conclusion
 that none of
 the before-
 mentioned

If what has been urged be well founded,

⁴ See also 14 Est, 332. 1 Maule & Selw. 77. 1 Taunt. 208.

the conclusion to be drawn is,—that neither a fishery, nor a right to wreck, nor the franchise of royal fish, nor, *perhaps*, the usage or custom of digging of sea-weed, shells, or sand, ought to support a claim to the actual freehold and ownership of the soil of any tract of sea, or sea-shore, bounding a manor,—so long as it retains the character of sea-shore,—where presumption arising from the more decisive acts of ownership of intaking and granting the soil itself, and the presentment and punishment of purprestures are wanting. All such *franchises* and *liberties* are distinct from the ownership of the soil, both in essence, in title, and in technical character; and the enjoyment of such rights does not, by any *necessary* presumption, involve the seizin and ownership of the soil in which they are exercised. And if this be not the case, between subject and subject, *a fortiori* it ought not to be against the King's ownership and title.

It may be here also noted, that Lord Hale himself, in one part of his work, (see *Jure Maris*, p. 108) lays it down as law, that *custom* “cannot entitle the subject to *relicted* “lands, or make such lands part of a manor.” If so, it may, perhaps, be reasonably contended, that the enjoyment of mere customary privileges in the shore cannot “entitle the “subject to the lands of such shore, or make “such lands part of the manor.”

Impolicy of
favouring in-
dividual
claims to the
sea-shore
against the
King's rights.

Neither would there seem to be better ground in point of policy than at law for thus taking, by means of presumption alone, the ownership of the sea-shore from the King, and transferring it to individuals, whose private gains and petty profits may create frequent public inconvenience and illiberal extortion. In a commercial country, such as England, the free and unrestricted use of the sea-shore is of national importance, and no encouragement ought to be given to claims which have a tendency materially to interfere with the national welfare, and they ought therefore to be treated *stricto jure*.

Civil law doctrine as to ownership of the shore.

It is well known, that by the Roman law the sea-shore was common to all, and incapable of ownership, even in the Emperor. ‘Littorum quoque usus publicus est jure gentium, sicut et ipsius maris;—*proprietas* autem eorum potest intelligi *nullius* esse; sed ejusdem juris esse, cujus et mare et quæ subjacet mari, terra vel arena.’⁶ So also, Grotius⁷ holds, that a man cannot have any property in the shores and sands of the sea; these are all incapable of improvement, and can only be exhausted by the only uses to which they can be applied; viz. of supplying

⁶ Inst. Lib. 2 tit. 1. sec. 5 lib. ii. sect. 2. c. 3.

⁷ Grot. de Jur. Bell. ac Pac.

fish and sand. And even our own early law writers did not hesitate to hold *nearly* the same doctrine as part of our own law. "Naturali vero jure," says Bracton,⁸ "*communia sunt omnia hæc,—aqua profluens, aer et mare, et littora maris, quasi maris accessoria. Nemo enim ad littora maris accedere prohibetur, dum tamen a villis et ædificiis abstineat, quia littora sunt de jure gentium communia, sicut et mare.*" But he does not add the remainder of the sentence from the civil law, viz. "*proprietas autem eorum potest intelligi nullius esse,*"—by which it may be inferred, that he did not mean to deny that the "*ownership*" (such as it was) rested with the King, asserting only that the "*usus*" was common to all, as that of the sea was;—and so far he will be found essentially right;—for the uses to which the sea is applicable, and also common to all, are "navigation" and "fishing,"—and for these uses the shore is acknowledged to be equally applicable and common. Other common uses of the shore have been of late claimed on behalf of the public, viz. for the purpose of bathing in the sea,⁹ and for digging and carrying away sand, shells, stones, and weed, for agricultural and building purposes.¹⁰ The value and utility of

⁸ Bracton, lib. ii. fol. 7. sect. 5.

¹⁰ Bagott v. Orr, 1 Bass. & Pul. 472. See these cases

⁹ Blundell v. Catterall, 5 Jac. & Walk. 268.

fully considered hereafter.

these rights to the public, entitle them to the fullest consideration before the law is to be deemed settled *against* these enjoyments. It might seem most desirable that the shore should remain vested in the King, whose policy it would be to leave it open to his subjects for useful purposes, and to be, as it were, the trustee thereof for the public use and benefit.

Alienation of
Crown lands
prohibited.

There was a time when the Crown could grant away to the subject the royal demesnes and landed possessions at pleasure; but now, by statute law,¹ such royal grants are prohibited, and the Crown lands cannot be so aliened. So much, therefore, of the sea-shore as has not been actually aliened by grant, and bestowed on lords of manors and other subjects, still remains vested in the Crown, incapable of alienation. A King of England cannot be insensible of the value of this property, for it concerns, through him, the public advantage; and it is not going too far to say that the Crown ought, upon all occasions, to evince great jealousy in the preservation of this right against the encroachments of particular individuals, and to require the strictest proof of their exclusive ownerships, whensoever claimed. The law itself protects the property of the Crown with greater jealousy and strict-

¹ 1 Anne, ch. ii. sec. 5.

ness than the property of the subject. The rule, as before stated, being that the King's grants shall be construed *strictly*, and with a leaning in his favour as against the grantee;² but that, as between subject and subject, the grant shall be construed most in favour of the grantee and against the grantor. But to support a title to the sea-shore in favour of the subject against the Crown, upon "presumption" drawn from the enjoyment of a prescriptive right,—is to open a wide door to individual claims against Crown lands. The King's right is a *jus publicum*, and it is not the rule of our Courts of Justice to assert or favour the *jus privatum* against the *jus publicum*; on the contrary, the *jus privatum* is to be tried *strictissimo jure*, whenever it offends or may offend against the public good or public rights.

An express grant of so much sea-shore from the King, made at a time when such grants were not prohibited by statute law, cannot, of course, be set aside. But, as the other lands of the Crown cannot be taken from the Crown by a claim or presumption founded on prescription,—and the sea-shore is as much land of the Crown as any other land in its possession,—there seems to be no better ground

² Bro. Abr. Tit. Patent, pl. 62.

for admitting mere prescription to prevail in the one case than in the other; nor has a single case or decision presented itself wherein the learned writer of the treatise so much referred to has been confirmed in his doctrine, that a title to a prescriptive franchise, liberty, or easement, derivable from the sea or sea-shore, will, by presumption or construction of law, support a title to land; nor can it possibly do so, if the doctrine quoted in a former page^a be law, viz. that prescription alone cannot give title to lands, because of lands more certain evidence of title may be had; viz. by grant;—or by adverse possession during the period prescribed by the statutes of limitation.

Public rights
construed fa-
vourably.

But although it may be deemed an object of no small importance to protect the right of the Crown to the sea-shore, against the encroachments of individuals; yet, where a claim is made on behalf of the *public*, and the King's right is opposed to the general right of the subject, the Courts of Law, which favour liberty, and have an anxious regard for public rights, and presume the King himself to be personally interested in the public good, will protect the claims of the public to the utmost verge of the law. The *ownership* of the shore, as between the public and the King, has been

^a P. 22, ante.

settled in favour of the King; but, as before observed, this ownership is, and has been immemorially, liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects. These rights are variously modified, promoted, or restrained by the common law, and by numerous acts of parliament relating to the fisheries, the revenues, and the public safety, but a statement of which is not within the limited scope of our subject.

Let us now proceed to enquire how the law stands with regard to tracts of dry land adjoining the shore which are deserted by the sea, and become *terra firma* by new formation, and usually are interposed between the old *terra firma* and the ordinary high water mark of the shore. It is for the most part barren and waste, but in some places, (particularly in low and marshy districts,) capable of pasturage and cultivation. This soil embraces not only that which is always dry, but that also which is subject to high spring tides and extraordinary inundations. It is all deemed land gained from the sea.⁴

As to derelict
land and allu-
vion.

Land gained from the sea is of three kinds :

⁴ De Jure Maris, ch. iv. sec. 2. & ch. vi. & see pp. 10 & 11 ante.

1st. Per alluvionem, alluvion, or land washed up by the sea.

2nd. Per relictionem, derelict land, or land left dry by the shrinking or retirement of the sea.

3rd. Per insulæ productionem, i. e. islands and islets gradually or suddenly formed out of the sea, or at the mouths of rivers, &c.⁵

The law on this part of the subject is laid down by Blackstone,⁶ in these words: “As to
 Alluvion. “lands gained from the sea either by *alluvion*,
 “i. e. by the washing up of sand or earth, so
 “as in time to make *terra firma*; or by *dere-*
 “*liction*, as when the sea shrinks back below
 Derelictions “the usual water mark, in these cases the law
 imperceptible. “is held to be, that if this gain be by little
 “and little, by small and *imperceptible* de-
 “grees,—it shall go to the owner of the land
 “adjoining for ‘*de minimis non curat lex*;’
 “but if the alluvion or dereliction be sudden
 “and considerable, the land shall go to the
 “King, as lord of the sea.” His authorities
 are, Bracton, lib. ii. c. 2. Callis on Sewers.
 2 Roll. Abr. 170. Dy. 326.⁷

The words of Bracton are,⁸ “Item quod per

⁵ De Jure Maris, 27, 28.
 Callis, 50.

⁶ 2 Black. Com. 61.

⁷ And see note to Dyer, 326.

⁸ Lib. ii. ch. 2.

“alluvionem agro tuo flumen adjecit, jure
 “gentium tibi acquiritur. Est autem alluvio
 “latens incrementum, et per alluvionem ad-
 “jici dicitur, quod ita paulatim adjicitur, quod
 “intelligere non possis quo momento temporis
 “adjiciatur, &c. si autem non sit latens incre-
 “mentum, contrarium erit.” Lord Hale^o ob-
 serves upon these words, “Bracton follows
 “the civil law in this and some other follow-
 “ing cases; and yet, even according to this
 “the common law doth regularly hold at this
 “day between party and party.” And he
 further observes, “This jus alluvionis is, de
 “jure communi, by the law of England, the
 “King’s; viz. if by any marks or measures it
 “can be known what is so gained; and if the
 “gain be so insensible and indiscernible by
 “any limits or marks, that it cannot be known,
 “idem est non esse et non apparere, as well
 “in maritime increases as in the increases of
 “inland rivers.”

Although the doctrine is laid down by Brac-
 ton and Lord Hale upon the word “*alluvio*,”
 yet there is no doubt that Blackstone is right
 in applying it also to gradual and imper-
 ceptible *derelictions* of the waters; in both
 cases the owner of the soil adjoining is en-
 titled by common law, for the reasons given
 by these writers; viz. “de minimis non
 “non curat lex,”—“idem est non esse et non
 “apparere;” and because it is in compen-

Belong to the
 owner of the
 adjacent land.

sation for land either actually or in danger of being lost.¹⁰ Blackstone¹ says, that the soil so gained by the owner extends to "the *USUAL* water mark;" he does not explain what is the usual water mark; whether the high or low water mark, but from what is already said, it is clear that the *usual* water mark is the high water mark.²

Now, the owner here intended is the absolute owner of the *freehold*; it cannot mean a *leaseholder* or *copyholder*, for these are not looked upon by the law in the light of land-owners. If, therefore, the lord of the adjoining manor claim at all, he must claim in respect of his freehold, and he has the freehold,—

What ownership of the adjacent land entitles to the alluvion, &c.

1st. Of the demesnes; i. e. the freehold lands in his own occupation.

2nd. Of the copyhold tenements; i. e. subject to the copyholder's interest.

3rd. Of the waste; i. e. subject to the tenant's right of commonage, &c.

And by consequence, if either the demesnes, the copyhold, or waste, constitute the land immediately adjoining, the lord, as freeholder, will be entitled to the alluvion soil on the

¹⁰ Callis, 48.

¹ Black. 2 vol. p. 261.

² P. 9. ante et seq.

coast, as far as high water mark. By the same rule, any owner of the *freehold* of the land immediately adjoining to and in boundary limited by the sea, will be entitled as far as high water mark; and if the lord of the manor part with his freehold to another, in any spot of land adjoining to the coast, such person, it is conceived, acquires all "alluvion," properly so called, from the sea.

As to the demesnes, or lands in the lord's own hands, viz. which are neither copyhold nor waste, such land being his own absolute freehold, clearly entitles him to the adjoining alluvial land gained gradually and imperceptibly from the sea, as part of such demesnes,—and on this point no more need be said. But his freehold title in the copyhold tenements, and in the wastes, is subject to certain rights and interests, which require further consideration, and it may be contended,

As to the nature of the interest the lord of a manor gains in alluvion which attaches to a copyhold tenement,

1st. That if the adjoining land be a copyhold tenement, and its boundary is no otherwise limited than by the sea, then the copyholder acquires the same right to the alluvion as he had in the copyhold adjoining, and may claim to hold such new soil as copyhold, and part of his old tenement; and,

and the copyholder's interest therein.

2nd. That if the adjoining land be *waste* land of the manor, then all the copyholders

As to the right of the tenants, where such

alluvion is
part of the
wastes.

have the same rights of common, &c. in the alluvion or new soil, that they had in such waste land adjoining, and as if it were part of such waste.

As to the co-
pyholder's
right in re-
spect of his
tenement.

As to the first point, viz. the copyholder's right,—it must be very much a question depending upon the description of the “tenement” in the court rolls of the manor. If the tenement, to which the copyholder has been admitted, extend, either expressly or by fair implication, to the sea, or expressly or by implication to high water mark, then it may be contended that the new alluvial soil is part of the copyhold tenement adjoining; but if the boundary of the tenement be fixed, on the side of the sea, to a particular demarcation, *other* than that made by the water mark for the time being, and short of it, then all beyond that line of demarcation is clearly no part of his tenement, and must either be part of the demesnes or of the waste.

As to the
lord's right as
opposed to the
copyholder's.

If the lord set up a claim to the alluvion, against the copyholder, when the adjoining land is copyhold, it must be in respect of his interest in the land adjoining, which is a *freehold* interest, subject to a *copyhold* interest. He cannot claim it as part of his own private demesnes, because he cannot show the adjoining land to be such, it being copyhold, nor can he claim it as part of the waste, because

the adjoining land is copyhold, and not waste land.

Next, suppose him to claim the alluvion as part of the adjoining waste, by the same reasoning as last used, the new soil being adjacent to the waste, is part of it, and subject to all the rights claimable in or out of the old waste, and by consequence to the local customs, commons, &c. (if any,) alleged or prescribed for by the tenants in respect of such waste.

As to the lord's claim when the alluvion is waste.

Having stated, that in regard to the new alluvial soil gradually heaped up and deposited at and above the edge of high water mark, the lord, if possessed absolutely of the adjoining land, is entitled to such new soil, absolutely; but if only of the freehold of the copyhold tenement, then subject to such copyhold interest; and if only of the wastes, then subject to the customary rights of the tenants for commonage, &c. in such waste.—It may be further observed, that land gradually and *imperceptibly* left “*PER RECESSUM MARIS*,” is subject to the same kind of claim, both in respect of the person, the form, and the substance, as the *alluvion* or soil heaped up “*PER PROJECTIONEM MARIS*,” and may, in like manner, assume the character of freehold demesnes, copyhold, or waste, according to the nature of the soil adjacent.

The same doctrine as to land imperceptibly derelict.

The gradual retreat of the sea, generally the effect of alluvion, and more properly so called.

The gradual and insensible *retreat* of the sea is, however, generally *the effect of its own action by the heaping up of alluvial soil, beach, or sand*; and the land thus acquired may rather be said to have been gained *per alluvionem* or *projectionem*, than *per recessum* or *relictionem maris*. Thus it is observed by Lord Hale, that "there is no alluvion without some kind of reliction, for the sea shuts out itself." When, therefore, we speak of land acquired "*per alluvionem*," we may be understood to mean all *imperceptible* additions made by the sea to the adjacent soil; and when we speak of "*derelict*" land, we intend thereby land *suddenly*, and by *evident marks and bounds*, left and become dry land. There may indeed be some cases wherein it is matter of doubt whether the acquiescence ought to be deemed insensible and gradual, or sudden and manifest. Such cases must be left to the common sense and judgment of the jury, and the nature of the evidence, always remembering that *prima facie* and *jure communi*, the land gained is the King's, since it was clearly his so long as it remained sea bottom, and it is only *not* given to him, in the case in question, because of the difficulty of drawing the line, and the unwillingness of the common law (in respect of its own dignity and the liberty of the subject) to be too nice in trifles; "*de minimis non curat lex*."

The word "derelict" is understood to import sudden and perceptible gains from the sea.

Whether imperceptible or not must be left to the jury.

Large acquiescence from

In marshy districts, however, a case might

occur of some nicety ; viz. where the sea gradually heaps up a bar to itself across a marshy arm or inlet of the sea ; the communication between the sea and the inlet becoming gradually less, until at last the entrance is quite blocked up, and the inlet becomes a lake or pond, which also is capable of being drained, or gradually drains itself. Such an acquest from the sea may sometimes be of considerable extent and value. Now, if the lord of the adjoining manor can establish no title to the soil, as and when it was covered with water, the only question will be, whether it is a gradual and insensible or sudden and distinct acquest from the sea. On the part of the King it may be insisted that, until the sea was finally shut out, so much, at least, as was “ aqua cooperta,” continued part of the sea-bottom, and *as such* belonged to the King ; and, consequently, that until the hour that the communication was shut out by the action of the last tide or storm, all the land covered with water was the King’s ; that the final exclusion of the sea was not a gradual but sudden effect, and that immediately thereupon the lake and its soil became, to the then edge of the still water, the King’s own, and relieved from the common law rights of fishing, &c. That all subsequent diminution of the water by evaporation and drainage, natural or artificial, was for the benefit of the King, whether such drainage be gradual and imperceptible or not. It may

the sea in marshy districts, by gradual exclusion of the sea, forming marshes, lakes, ponds, &c.

As to the King’s right therein.

also be insisted, that it is not the gradual or slow operation of nature in point of *time*, but the small and *imperceptible* nature of the daily addition of *soil* which governs the title in favour of the subject; and consequently, where the acquisition is not of that character, the reason for the rule against the King's right does not exist; and these, it is considered, are the grounds which would decide the case in favour of the Crown.

As to the claim of the owner of the adjacent soil therein.

On the side of the owner of the adjoining soil, it may, however, be urged, that at least so much of the dry soil as had been added to his adjacent land, by the gradual and insensible decrease of the water, from the gradual closing of the communication with the sea and decrease of tide, becomes *de die in diem* his own "jure alluvionis," and that the King's claim can extend no farther than to that portion which is proved to have been subject to the tide at the time of the final exclusion of the sea. It may also be urged, with some plausibility, that the lake or pond which remains after the sea has shut out itself by a bar,—has become, in the eye of the law, "land,"—i. e. *inland*, *aqua cooperta*; and that its gradual formation into a still water lake or pond, was tantamount to a gradual dereliction of so much land, i. e. an imperceptible addition, from time to time, of so much lake or pond of still water; and inas-

much as a lake or pond, surrounded by the land, is merely land in construction of law, so *this*, having become imperceptibly surrounded by land, and cut off from the sea by its own action, has imperceptibly become so much additional soil to the adjacent old terra firma. But the answer to this is, that so long as any communication continues open with the sea and its tides, the whole soil which the water covers must have the same character in point of title, and be treated as "*pars maris.*" Such peculiar cases as these must depend on the circumstances in evidence, and upon the point "*an graduatim an non?*" A question determinable only by evidence, and the judgment and common sense of the Judge and Jury. The inquiry is a question at common law, between the King and the subject, on a matter of *fact*; the law being already well known and established, and as the fact may be found, the land will be disposed of by the law; viz. if it be a gradual and imperceptible acquist, to the subject; if otherwise, then to the King. The evidence on both sides will be deduced from eye-sight and hearsay testimony, natural or artificial land marks, perambulations, records, and written documents, tending to show whether the events and alterations which have happened are of a nature to be rightly deemed sudden and distinct, or gradual and too minute to be distinguished by ordinary observation.

It is not the gradual lapse of the time, but the imperceptible nature of the addition, which favours the subject.

It is not, indeed, either the *sudden* or the *gradual* nature of the *event* which governs the law, but the *perceptible* or *imperceptible* nature of the *acquisition*; and therefore the direction of the evidence will be to show the greater or less degree of distinctness and certainty with which the *quantum* of soil claimed can be ascertained to have accrued within time of memory. Whatever reason and common sense denominates imperceptible and indefinable, or which, even if perceptible and definable, is still too minute and valueless to appear worthy of legal dispute or separate ownership, will be deemed part of the adjoining soil, and, as it were, to have grown out of it. In all other cases cases the King's right will attach.

Lord Hale observes, that *custom* may, in the case of alluvion, "give the *jus alluvionis* "to the land whereunto it accrues."¹ But if the *jus alluvionis* be a general common law right, it does not appear how it can be given by "custom," unless the word be used in the sense of the "general custom of the realm," which is the common law. The following cases are quoted by him.

Abbot of Ramsey's case.

"Communia² Trin. 43 E. 3. Rot. 13, in Scaccario, which is that very record which is cited by Dyer, 326, out of the book of Ramsey.

¹ P. 28.

² The Abbot of Ramsey's case, de Jur. Mar. 28.

Process went out against the Abbot of Ramsey, ad ostendendam causam, quare 60 acrae marisci in manum Regis non debent sesiri, quas Abbas appropriavit sibi et domui suæ, sine licentia Regis, super quodam generali commissione de terris a Rege concelatis et detentis. Abbas respondit, quod ipse tenet manerium de Brancaster, quod *scituatur* est juxta mare, et quod est ibidem quidam mariscus, qui aliquando per influxus maris minoratur, aliquando per defluxus maris augetur, absque hoc quod appropriavit sibi prout per præsentationem prædictam supponitur. And issue joined, and verdict given for the Abbot, by Nisi Prius, before one of the Barons. “Et judicium, quod eat sine die, “salvo semper jure Regis.” The learned writer hereupon subjoins, “though there “were a verdict upon the issue, whether appropriated an non, yet it is plain that the “title stood upon that which the Abbot “alleged by way of increment. And note, “here is *no custom* at all alleged; but it “seems he relied upon the *common right* of “his case, as that he suffered the loss, so he “should enjoy the benefit, *even by the bare “common law*, in case of alluvia.”

The next case is stated, by Lord Hale, as follows,—“M. 23. E. 3. B. R. Rot. 26. Lincolnia. “The Abbot of Peterborough³ was

Abbot of Peterboro's case.

³ Abbot of Peterborough's case, ib.

“ questioned at the King’s suit for acquiring
 “ acras marisci in Gostrekill, licentia Regis
 “ non obtenta. The Abbot pleaded, quod
 “ secundum *consuetudinem patriæ* est, et a
 “ tempore quo, &c. extitit usurpatum, quod
 “ omnes et singuli domini, maneria, terras, seu
 “ tenementa super costeram maris habentes,
 “ particulariter habebunt maretum et sabulo-
 “ nem, per fluxus et refluxus maris, secundum
 “ majus et minus, prope tenementa sua pro-
 “ jecta. Et dicit, quod ipse habet quoddam
 “ manerium in eadem villa, unde plures terræ
 “ sunt adjacentes costeræ maris, et sic habet
 “ per fluxus et refluxus maris circiter 300
 “ acras maretti terras suas adjacentes, et per
 “ temporis incrementum secundum *patriæ*
 “ *consuetudinem*; et absque hoc quod ipse
 “ perquisivit, &c. And upon issue joined it
 “ depended many years before the issue was
 “ tried. But afterwards, P. 41. E. 3. B. R.
 “ Rot. 28, Lincolnia, Rex, viz. given, quod
 “ secundum *consuetudinem patriæ*, domini
 “ maneriorum prope mare adjacentium habe-
 “ bunt *marettum* et *sabulonem* per fluxus et
 “ refluxus maris per *temporis incrementum*
 “ ad terras suas costeræ adjacentes projecta,
 “ &c. Ideo Abbas sine die.” Lord Hale then
 “ proceeds to observe, “ 1st. Here is *custom*
 “ laid, and he relies not barely upon the case
 “ without it. 2d. In this case it was per in-
 “ crementum temporis et per mare projecta.
 “ It is not a sudden reliction or recessus maris.

“ And though there is no alluvio without some
“ kind of reliction, for the sea shuts out itself,
“ yet the denomination is taken from that
“ which predominates. It is an acquet per
“ projectionem, not per recessum or relic-
“ tionem. 3d. That such an acquisition lies
“ in *custom and prescription*, and it hath a
“ reasonable intendment, because these secret
“ and gradual increases of the land adjoining
“ cedunt solo tanquam majus principali; and so
“ by custom it becomes a perquisite to the land,
“ as it does in all cases by the civil law.”

It must be concluded that the “*consuetudinem patriæ*” is to be interpreted “the custom of the realm,” which is the common law. It does not appear how a local custom of this kind can exist, as contradistinguished from the common right; for, by common right, imperceptible alluvions or derelictions belong to the owner of the adjacent freehold, throughout the coasts of England.

The words “*secundum majus et minus*,” and “*incrementum temporis*,” put this case upon precisely the same ground as the former one. All other writers agree that such a right as the one claimed and established in both these cases, is a common law right, and if so, it cannot correctly be pleaded as a local custom; and at this day, beyond doubt, it is quite enough to rely *barely* upon the common law,

acting upon the evidence of the gradual and insensible acquisition. The foregoing doctrine regarding "alluvion" was very fully argued and considered in the recent case of the *King v. Lord Yarborough*.⁴

The King v.
Lord Yarbo-
rough.

This was a record transmitted from the petty bag office into the Court of King's Bench, which sets forth an inquisition taken at *Cleathorps*, in the county of *Lincoln*, on the 12th day of *November*, 1818, by which, amongst other things, it was found that there is a certain piece of land, being salt marsh, lying near or adjoining to the parish or lordship of *North Cotes*, in the said county, which piece of land is bounded towards the south and south-west by the sea-wall or sea-bank of the said lordship of *North Cotes*, and towards the north-west by part of the sea-wall or sea-bank of certain lands in the lordship of *Titney*, and on all other parts by the sea, and contain, by estimation 453 acres or thereabouts, and is of the annual value of 4s. an acre, and was in times past covered with the water of the sea, but is now and has been for several years past by the sea *left*, and is not covered with water, except at *high* tides, when the sea doth flow to the said sea-walls or sea-banks; which said piece of land, from the time of such *dere-liction*, hitherto has been and still is unoccu-

⁴ 3 Barn. & Cress. 91.

pied, but the herbage thereof has been from time to time eaten and consumed by the cattle and sheep belonging to divers tenants or occupiers of lands situate within the said parish of *North Cotes*. And the inquisition then stated, that the said piece of land, together with other lands therein specified, the commissioners had taken and caused to be seized into the hands of our said lord the King. To this inquisition the defendant filed a traverse, which, (after craving oyer of the commissioners' return and inquisition, and admitting the boundaries, quantity, and value of the land in question, and that the same piece of land is now and has been for several years past not covered with water, except at high tides, when the sea doth flow to the said sea-wall or sea-bank,) states, that "from time whereof the memory
" of man runneth not to the contrary, there
" hath been and still is a certain manor called
" or known by the name of the manor of
" *North Thoresby cum North Cotes*, situate
" in the parish of *North Cotes* aforesaid, in
" the said county of *Lincoln*, and that the
" defendant, long before the respective days
" of issuing the commission and finding the
" inquisition, to wit, on, &c., was seized in
" his demesne as of fee, of and in the manor
" of *North Thoresby cum North Cotes*, and
" the demesne lands thereof, and that the
" same piece of land heretofore to wit, on the
" 1st day of January, 1300, and on divers

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“ other days and times between that day and
 “ the day of the finding the inquisition, by
 “ *the slow, gradual, and imperceptible pro-*
 “ *jection, alluvion, subsidence, and accretion*
 “ *of ooze, soil, sand, and matter, being*
 “ *slowly, gradually, and by imperceptible*
 “ *increase in long time cast up, deposited,*
 “ *and settled by and from the flux and reflux*
 “ *of the tide and waves of the sea in, upon,*
 “ *and against the outside and extremity of*
 “ *the demesne lands of the same manor, hath*
 “ been formed, and hath settled, grown, and
 “ accrued upon and against and unto the said
 “ demesne lands of the same manor, and the
 “ same and every portion thereof, when and
 “ as the same hath so there been formed,
 “ settled, grown, and accrued, hath thereupon
 “ and thereby at those times respectively in
 “ that behalf above mentioned, forthwith be-
 “ come and been, and from the same several
 “ times respectively have and hath continued
 “ to be, and still are and is part and parcel of
 “ the said demesne lands of the same manor,
 “ and the several owners and proprietors of
 “ the same manor for the time being during
 “ all the time aforesaid, until the time of the
 “ seizin of the defendant as aforesaid, and de-
 “ fendant, during the time he hath been so as
 “ aforesaid seized of and in the said manor,
 “ from the time of the formation and accretion
 “ of the same piece of land and every part
 “ thereof respectively, continually, until the

“ time of the finding of the inquisition re-
“ spectively, were and was seized in their and
“ his demesne as of fee, of and in the same
“ piece of land and every part thereof, when
“ and as the same hath so been formed and
“ accrued as aforesaid, as and for part and
“ parcel of the demesne lands of the same
“ manor. Without this, that the said piece
“ of land in the plea mentioned, and in the
“ inquisition last above mentioned, or any
“ part or parcel thereof, was or now is by the
“ sea *left*, in the manner and form as in the
“ inquisition is above supposed and found.”

—The replication of the Attorney General traversed part of the inducement to the defendant's traverse, as follows: “ Without
“ this, that the said piece of land in the inquisition lastly mentioned, being the piece of
“ land before described, at the times in the
“ said plea mentioned, by the slow, gradual,
“ and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand,
“ and other matter, being slowly, gradually,
“ and by imperceptible increase in long time,
“ cast up, deposited, and settled by and from
“ the flux and reflux of the tide, and waves of
“ the sea in, upon, and against the outside
“ and extremity of the demesne land of the
“ same manor, hath been formed, and hath settled, grown, and accrued upon and against
“ and unto the said demesne lands of the same
“ manor, in manner and form as the defendant

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“hath above in his plea in that behalf alleged;” and the defendant in his rejoinder took issue upon that fact.—The replication then took issue on the defendant’s traverse, “that the said piece of land, in the plea of defendant mentioned, was and now is by the sea *left*, in manner and form as in the inquisition is above supposed and found;” and thereupon also the defendant joined issue. These issues were tried at the then last assizes for the county of *Derby*, before *Park, J.*, and a verdict found for the *defendant*. A rule nisi having been obtained to show cause why a new trial should not be had, the Court directed, at the time of showing cause against the rule, that the facts proved at the trial should be stated in a special case for the opinion of the Court, and that if judgment should be given for the King upon such case, the verdict obtained for the defendant should be set aside and a new trial had; and if judgment should be given for the defendant upon such case judgment should be entered for the defendant upon the verdict. The case was as follows :

The land in question consists of 450 acres of salt marsh called *fittees*, being the land covered with herbage, which, at the time of taking the inquisition set forth in the pleadings, lay between the sea-wall and the sea opposite to *North Cotes*, in the county of Lin-

coln. It was proved that this land had been formed in the course of time by means of ooze, warp, silt, sludge, and soil carried down by the *Humber*, and deposited and cast up by the flux and reflux of the sea, upon and against the adjacent land, whereby the land has been enlarged and increased, and the sea has receded. The matter thus deposited is at first soft and sludgy, but in the course of five or six years grows firm, and then produces herbage. With respect to the degree or rate of growth and increase of the land, the evidence produced on the part of the Crown was as follows:—The first witness proved that the sea had receded in parts 140 or 150 yards within twenty-six or twenty-seven years, and that within the last four years he could see that it had receded much in parts, but could not say how much; and in parts he believed that it had not receded at all. The alteration, he said, had been slow and gradual, and he could not perceive the growth as it went on, though he could see there had been an increase in twenty-six or twenty-seven years of 140 or 150 yards, and that it had certainly receded since he measured the land the year before. The second witness proved, that in fifteen years there had been an increase of the fittes on the outside of the sea-wall; in some parts from 100 to 150 yards; that it grows a little from year to year. That within the last five years there had been a visible increase in

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some parts during that period, of from thirty to fifty yards; that the gradual increase is not perceptible to the eye at the moment. The third witness said, there had been some small increase in every year; and the fourth witness said, the swarth increased every year very gradually, and that perhaps it had gathered a quarter of a mile in breadth in some places within his recollection, or during the last fifty-four or fifty-five years, and in some places it had gathered nothing. It was proved that the ground between the sea-wall above mentioned and another sea-wall still more remote from the sea, appeared to have been covered over with the sea formerly.

Judgment of
the Court.

The judgment of the Court was delivered by Lord Tenterden, after the Court had heard Counsel and taken time to consider. " Upon
" this case the only question for the judgment
" of the Court is, whether the evidence given
" at the trial was such as to justify the verdict
" of the jury upon the issues joined. Whe-
" ther the pleadings have been correctly
" framed on either side, or what may be the
" legal consequence and effect of the verdict,
" supposing it to stand, are points now before
" us. I notice this, because some part of the
" argument at the bar was more properly ap-
" plicable to a matter of law upon admitted
" facts, than to the question whether parti-
" cular issues are maintained by the evidence;

“ or, in other words, whether particular facts
“ are found to exist.

“ The second issue upon the record arises Distinction between derelict land and alluvion.
“ upon a traverse of the matter found by the
“ inquisition. The matter thus found is, that
“ the land now claimed by the Crown was in
“ times past covered with the water of the
“ sea, but is now, and has been for several
“ years *left* by the sea. Now, the distinction
“ between land derelict, or left by the sea,
“ acquiring a new character in consequence of
“ the mere subsidence and absence of the salt
“ water, and land gained by alluvion or pro-
“ jection of extraneous matter, whereby the
“ sea is excluded and prevented from over-
“ flowing it, is easily intelligible in fact, and
“ recognized as law by all the authorities on
“ the subject. Upon the evidence it is very
“ plain, that the land in question is of the
“ latter description, and therefore the issue
“ joined upon this point was properly found
“ for the defendant.

“ The principal question arose upon the first
“ issue, and it is, as I have before intimated,
“ merely a question of fact. The defendant
“ has pleaded, that the land in question, by
“ the *slow, gradual, and imperceptible pro-*
“ *jection, alluvion, subsidence, and accretion*
“ *of ooze, soil, sand, and other matter, being*
“ *slowly, gradually, and by imperceptible*

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“ *increase, in long time cast up, deposited,*
 “ *and settled by and from the flux and reflux*
 “ *of the tide and water of the sea,* in, upon,
 “ and against the outside and extremity of the
 “ demesne lands of the manor, hath been
 “ formed, and hath been settled, grown, and
 “ accrued upon, against, and unto the said
 “ demesne lands. This allegation has been
 “ denied on the part of the Crown, and an
 “ issue taken upon it. The allegation regards
 “ only the manner in which the land has been
 “ formed : it contains nothing as to the result
 “ of its formation, nothing as to the practi-
 “ bility of ascertaining, after its formation,
 “ by any marks or limits, or quantity pre-
 “ viously existing and known, or by measure
 “ to commence and be taken from such marks,
 “ or with reference to such quantity, how
 “ much is now land that once was sea. It is
 “ clear upon the evidence, that the land has
 “ been formed slowly and gradually in the
 “ way mentioned in the plea. The argument
 “ was upon the word ‘imperceptibly;’ and
 “ for the Crown, two passages were cited
 “ from *Sir Matthew Hale’s* treatise, *De Jure*
 “ *Maris*, wherein that very learned writer
 “ speaks of land gained by *alluvion*, as belong-
 “ ing generally to the *Crown*, unless the gain
 “ be *so insensible that it cannot be by any*
 “ *means*, according to the words of one of the
 “ passages, or *by any limits or marks*, ac-
 “ cording to the words of the other passage,

“ found that the sea was there ; idem est non
“ esse et non apparere. In these passages,
“ however, Sir Matthew Hale is speaking of
“ the legal consequence of such an accretion,
“ and does not explain what ought to be con-
“ sidered as accretion insensible or imper-
“ ceptible in itself, but considers that as being
“ insensible, of which it cannot be said with
“ certainty that the sea ever was there. An
“ accretion extremely minute, so minute as to
“ be imperceptible, even by known antecedent
“ marks or limits, at the end of four or five
“ years, may become, by gradual increase,
“ perceptible by such marks or limits at the
“ end of a century, or even of forty or fifty
“ years. For it is to be remembered, that if
“ the limit on one side be land, or something
“ growing or placed thereon, as a tree, a
“ house, or a bank, the limit on the other side
“ will be the sea, which rises to a height vary-
“ ing almost at every tide, and of which the
“ variations do not depend merely upon the
“ ordinary course of nature, at fixed and
“ ascertained periods, but in part also upon
“ the strength and direction of the wind,
“ which are different almost from day to day.
“ And, therefore, these passages from the
“ work of Sir Matthew Hale are not properly
“ applicable to this question ; and considering
“ the word ‘ imperceptible ’ in this issue as
“ connected with the words ‘ slow and gra-
“ dual,’ we think it must be understood as

Meaning of
the word “im-
perceptible;”
it imports the
manner of the
accretion.

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“ expressive only of the manner of the accre-
“ tion, as the other words undoubtedly are,
“ and as meaning imperceptible in its pro-
“ gress, not imperceptible after a long lapse
“ of time ; and taking this to be the meaning
“ of the word ‘ imperceptible,’ the only re-
“ maining point is, whether the accretion of
“ this land might properly, upon the evidence,
“ be considered by the jury as imperceptible.
“ No one witness has said that it could be
“ perceived, either in its progress or at the
“ end of a week or a month. One witness,
“ who appears twice to have measured the
“ land, says, that within the last four years he
“ could see that the sea had receded, but he
“ could not say how much ; the same witness
“ said, that it certainly had receded since he
“ measured it last year, but he did not say
“ how much ; and, according to his evidence,
“ the gain in a period of twenty-six or twenty-
“ seven years, was on the average about five
“ yards and a half in the year. Another wit-
“ ness speaks of a gain of from 100 to 150
“ yards in fifteen years ; a much greater in-
“ crease than that mentioned by the first wit-
“ ness ; and this witness adds, that during the
“ last five years there had been a visible in-
“ crease in some parts of from thirty to fifty
“ yards. Upon the evidence of this witness,
“ it is to be observed that he speaks very
“ loosely, the difference between 100 and 150
“ in fifteen years, and between thirty and fifty

“ in five years, being very great. The third
 “ witness said, there had been some small in-
 “ crease in every year. The fourth witness
 “ said, the swath increases every year very
 “ gradually, and *perhaps* it had gathered a
 “ quarter of a mile in breadth in some places
 “ within his recollection, or during the last
 “ fifty-four or fifty-five years, and in some
 “ places it had gathered nothing. And this
 “ was the whole evidence on the subject.
 “ We think the jury might, from this evi-
 “ dence, very reasonably find that the increase
 “ had not only been slow and gradual, but
 “ also imperceptible, according to the sense
 “ in which, as I have before said, we think
 “ that word ought to be understood; and,
 “ consequently, we are of opinion, that a new
 “ trial ought not to be granted, and the rule,
 “ therefore, must be discharged.”¹

It remains to be observed, that with regard As to sudden violent derelictions of land.
 to derelict land left by any *sudden* and *violent*
 shrinking or retreat of the sea, whether upon
 the open coasts, or in creeks, or arms or inlets
 of the sea, it *uniformly belongs to the King*,
 and may be claimed by him at any time within
 the period fixed by the statutes of limitation.
That, also, must be regarded in the nature of

¹ A judgment of the House of Lords has since been reported in 5 Bing. Rep. C. P. p. 163. by which this decision of the Court of K. B. has been confirmed.

derelict land, and as vesting in the Crown, which, although not *suddenly* left by or gained from the sea, is, nevertheless, upon the evidence, perceptible in its acquisition and increase, in quantity and limits not to be mistaken by ordinary observation.

In a note to Vaillant, ed. of Dyer,² p. 326 b. it is said, “ the Prince [King] shall have all
“ lands left by or gained from the sea. I have
“ seen and perused a treatise thereon and
“ therein many examples of Romney Marsh
“ and Bromhill, in Kent, of which there are
“ farmers to the King; and there is vouched a
“ memorandum they came to an agreement with
“ the Lord the King. Trin. 43 Ed. 3d Rot. 13,
“ ex parte of the Treasurer’s Remembrancer.

If the sea-marks of land covered by the sea can be ascertained, it remains to the original owner, or returns when the water is gone.

“ If the sea-marks are gone, so that it cannot
“ be known if ever there was land there, the
“ land gained from the sea belongs to the
“ King. But if the sea cover the land at flux
“ of the sea, and retreat at the reflux so that
“ the sea-marks are known, if *such* land be
“ gained from the sea, it belongs to the
“ owner.” 8th Eliz., Corporation of Rumney’s
case. This is an addition to Dyer, by the
Editor, from Dyer’s own notes. So Lord
Hale lays it down, that “ if a subject hath land
“ adjoining the sea, and the violence of the sea
“ swallow it up, but so that there be yet rea-

² Dyer, 326 b.

“sonable marks to continue the notice of it,
 “or though the marks be defaced, yet if by si- Recovery of
ground once
overflown
terra firma but
since flooded.
 “tuation and extent of quantity, and bounding
 “upon the firm land, the same can be known,
 “though the sea leave the land again, or it be
 “by art and industry regained, the subject doth
 “not lose his property; and accordingly it
 “was held by Cooke and Foster, M. 7 Jac.
 “C. B. though the inundation continue forty
 “years.” For which he cites Dy. ub. sup. and
 “a notable case of an overflowing by the
 “Thames,” Rot. Parl. 8 E. 2. M. 23. Burnet v.
 the Bishop of Bath and Wells.³ Callis⁴ also,
 in his book on sewers, puts this case: “The
 “sea overflows a field where divers men’s
 “grounds lie promiscuously, and there con-
 “tinueth so long, that the same is accounted
 “parcel of the sea; and then after many years
 “the sea goes back and leaves the same, but
 “the grounds are so defaced as the bounds
 “thereof be clean extinct, and grown out of
 “knowledge, it may be that the King shall have
 “these grounds; yet in histories I find that
 “*Nilus* every year so overflows the grounds ad-
 “joining, that their bounds are defaced there-
 “by, yet they are able to set them out by the
 “art of geometry.” At this day it may be con-
 cluded that the former ownership may be iden-
 tified by mensuration, so that if the sea sud-

³ Vin. Abr. title Prerogative, D. 62.
 title, B, a, 2. Com. Dig.

⁴ Callis, p. 51.

denly swallow up ten acres, and after several years leave twenty acres dry, the ten acres may be reclaimed by admeasurement, but then the locality must be proved.

Sudden accession of land is not alluvion.

As soon as it is found by inquisition of office to be land *derelict*, the King's title attaches by the common law. "This accession of land," says Lord Hale,⁵ "in this eminent and sudden manner, by the recess of the sea, doth not come under the former title of *alluvio*, or increase *per projectionem*; and therefore, if an information of an *intrusion* be laid for so much land relict *per mare*, it is no good defence against the King to make title *per consuetudinem patriæ* to the *marettum*, or *sabulonem per mare projectum*; for it is an acquet of another nature. And this was accordingly adjudged, H. 12. Car. Rot. 48. in the case of the King against Oldsworth and others, for Sutton Marsh, in Scaccario. And in that case it was likewise held and adjudged that lands acquired *per relictionem maris* are not *prescribable as part of a manor*, or as belonging to the subject; for that were to prescribe, in effect, that the narrow seas to the coast of France or Denmark were part of a manor. In that case the information, plea, and judgment, were in substance as followeth; viz. Quod cum 7,000 acræ marisci salci vocati Sutton

Derelict soil does not lie in prescription.

⁵ De Jur. M. 30.

Marsh jacentes et existentes juxta Sutton Long in comitatu prædicto, videlicet, inter Sutton Long et mare ad refluxum ejusdem, fuissent parcella littoris marini, ac ad refluxus maris naturales et ordinarios aquis salsis et marinis inundatæ: cumque eadem 7,000 acræ marisci salsi nuper a mari undæ inundatæ fuissent, fuissent relictæ. Then the information sets forth a grant by King James, under the great seal, to Peter Ashton and others, and a regrant by them by a deed inrolled to the King, and that Michael Oldsworth, &c. intruded. The defendant, Oldsworth, came in, and as to part, pleaded as tenant, viz. "Quod bene et verum est, quod prædicta 7,000 acræ marisci salsi vocati Sutton Marsh, jacentes et existentes juxta Sutton Long; viz. inter Sutton Long et mare ad refluxum ejusdem, fuerunt parcellæ littoris marini, et ad refluxus maris naturales et ordinarios aquis salsis inundatæ, et a mare relictæ prout per informationem. But he further saith the King was seized, in right of the duchy, of the manor of Sutton, et quod plures terræ dicti manerii ante relictionem dictæ costeræ maris adjacebant; et quod *consuetudo patriæ est* et a tempore quo, &c. quod domini maneriorum, terrarum, seu tenementorum super costeram maris adjacentium, particulariter habebunt maretum et sabulonem per fluxum et refluxum maris *secundum maius et minus*

prope terras seu tenementa sua projectum sive relictum; quodque et prædictæ 7,000 acrae marisci salsi ad terram prædictam parcellam manerii de Sutton adjacent, et per fluxus et refluxus maris relictæ fuerunt a mari, et projectæ ad terram prædictam parcellam manerii de Sutton prædicti, ratione cujus relictionis prædictæ dominus ut fuit scissitus, &c. de prædictis 7,000 acris in jure ducatus, &c. And then he entitles himself by a grant under the duchy seal, and traverseth what he had not confessed. Upon this there was a demurrer and judgment for the King, upon solemn argument, and principally upon this reason, that *custom cannot entitle the subject to relictæ lands, or make it part of a manor*;⁶ and it differed from the case of the Abbot of Peterborough before cited, for there it was only *project*, but here, *relict* is added to the plea, that it might answer the information; though the plea in the Abbot of Peterborough's case was the precedent by which the plea was drawn, and with which it agreed, saving the addition of *relict*.

Custom cannot entitle de-
relict land.

⁶ This deserves notice. In a former page (92) we have seen, that Lord Hale considers prescription and usage time out of mind, to be sufficient to establish the ownership of the lord of a manor to the bed of the river Severn, as parcel thereof

along a large extent of coast, and to the derelict land there, which, it seems, is often considerable. There is some discrepancy between the doctrine here laid down and that above alluded to.

“ And yet the true reason of it is, *because the soil [once] under the water, must needs be of the same propriety as it is [was] when covered with the water.* If the soil of the sea, while it is covered with water, be the King’s, it cannot become the subject’s, because the water hath left it. But in the case of *alluvio maris* it is otherwise, because the accession and addition of the land by the sea to the dry land gradually, is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it *seems by the very course of the common law* such a gradual increase, *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi*, in case of the King, yet doubtless it gives a reasonableness and facility for such right of alluvio to be acquired by custom; for although in every acquet per alluvionem there be a reliction, or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.”—Lord Hale then adds, “ But this is to be carried along with us in the case of recessus, or *relicto maris, vel brachii ejusdem*; that where the land, as it stood covered with water, did by particular *usage or prescription*⁷ belong to a subject, there the recessus

⁷ But, according to this doctrine, derelict land *may* be *virtually* prescribed for, (a position denied ante p. 150.) —For if a man may prescribe

for 1000 acres of sea and the soil under it, the soil, whether wet or dry, is equally prescribed for. Here,

maris, so far as the subject's particular interest went while it was covered with water,—so far the *recessus maris vel brachii ejusdem* belongs to the same subject.”

“ The King of England hath the propriety as well as jurisdiction of the narrow seas ; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion, by a kind of possession which is not compatible to a subject, and accordingly regularly the King hath that propriety in the sea, but the subject hath not, nor indeed can have that property in the sea, through a whole tract of it, that the King hath ; because, without a regular power, he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, yet he may by *usage and prescription* acquire an interest in so much of the sea as he may *reasonably possess* ; viz. of a *districtus maris*,⁸ a place in the sea between such points,

also, there seems a discrepancy in his Lordship's doctrine. There seems no reason why portions of land under the sea may be prescribed for, and portions of land suddenly left dry, not.

⁸ Along the coast, therefore, where none of these inlets or *districti* are found, the land under the water, cannot, at all events, be prescribed for, being too open

and indefinable, and, therefore, the shore, in such places, is not prescribable, even if a “*districtus maris*” may be, although neither the one nor the other would seem correctly to lie in prescription. It is difficult also, to say what the quantity of sea is that a subject “may *reasonably possess* ;” that which the King has actually granted, we may

or a particular part contiguous to the shore, or a port or creek or arm of the sea. These may be possessed by a subject, and *prescribed* in point of interest, both of the water and *the soil itself*, covered with the water, within such a precinct; for these are manoriable, and may be entirely possessed by a subject." The learned writer then alludes to title by prescription:—

"The Civilians tell us truly, *nihil præscribitur nisi quod possidetur*. The King may prescribe the property of the narrow seas, because he may possess them by his navies and power. A subject cannot; but a subject may possess a navigable river or creek, or arm of the sea;—because these may be within the extent of his possession and acquist."

"The consequence," says he, "of this is, that the soil relinquished by such arms of the sea, ports, or creeks,—nay, though they should be wholly dried or stopped up, yet such soil would belong to the owner or proprietor of that arm of the sea, or river, or creek, for here is not any new acquist by the reliction, but the soil covered with water

If an arm of the sea, or other tract covered with sea, be the property of the subject, it continues so, when the water is dried off.

suppose the subject may reasonably possess; but what line shall be drawn as to the quantity or extent of sea a subject shall be allowed to claim by "prescription?"

was the subject's before, and also the water itself that covers it; and it is so now that it is dried up, or hath relinquished its channel, or part of it."¹

As to the right
to the soil in
Ports.

" And such an acquiescence of property in an arm or creek of the sea may be as well within the precincts of a port, as without; and *that* though the King, or some subject hath the port, in point of franchise or privilege.² For, although the soil of all creeks and navigable rivers, *especially within ports*, do originally belong to the King, in point of propriety, as well as in point of franchise, yet the subject may have so great and clear a possession of the soil lying under the water of that port, that it may belong to a subject in point of interest or propriety of the soil, though he have or have not the port in point of franchise;³ and consequently, if the sea should relinquish the channel, or creek, or

¹ Callis, p. 51, seems to deny this doctrine, as if the *change* produced a change of title; but there can be no difficulty in agreeing with the doctrine laid down in the text, *supposing the title to the soil when covered with water to have been good.*

² If the port has never been out of the hands of the Crown, and is an ancient port, q. if it be possible for the subject to be owner of its soil?

³ Also,—Since it is the

King's undoubted right to originate new ports, and since he is also *prima facie* absolute owner of the seabottom and sea-shore, q. is it possible that the courts of law can allow a Lord of a Manor to make title to so essential a part of the new port as the soil, (which may be of great extent,) on mere prescriptive evidence? The shore within the precinct of ports, often extends *several miles* along the coast. A title interfering with the

arm of the sea within such a port, it might and would belong to that subject who had the propriety of the soil, and water before it were so relicted."

"And this is an exception out of that generality, possibly, that *terræ relictae per mare* may not be prescribed. But a certain creek, arm of the sea, or *districtus maris*, may be prescribed in point of interest; and by way of consequence or concomitance, the land relicted there, according to the extent of such a precinct as was so prescribed, will belong to the former owner of such *districtus maris*. But otherwise it would be, if such *prescription*, before the reliction, extended only to a liberty, or *profit appendre*, or jurisdiction only within that precinct; as liberty of free fishing, admiralty jurisdiction, or the jurisdiction of a leet or hundred, or other court; for such may extend to an arm of the sea, as appears by 8 E. 2. *Coronæ*, for *these are not any acquests of the interest of the water and soil, but leave it as it found it.*"⁴

"Therefore, the discovery of the extent of

prerogative of originating new ports, ought not to be favoured.

⁴ This seems to contradict the doctrine of the same writer quoted and controverted in former pages of this tract. For if such

rights, when prescribed for, leave the water and soil where they found them, and are not acquests of the water or soil, they ought not to be construed into evidence of title to such water or soil.

the prescription or usage, whether it extend to the soil or not, rests upon such evidence of facts as may justly satisfy the court and jury concerning the interests of the soil." The learned author then proceeds to observe:—

1st. "That a subject may, by usage or *prescription*, be owner or proprietor of such an arm of the sea, creek, or particular portion of the sea contiguous to the shore, as *is not a public port or haven*, and consequently if that part be left dry, per recessum vel abstractionem maris, that will belong to that subject that had such antecedent propriety when it was covered with water."

"This will appear by a review of those cases that are in the precedent chapter concerning the right of fishing in the sea, many of which instances make it appear that there may be a right of propriety in the soil aqua cooperta, and the right of fishing *resulting* not as a profit *aprendre*, but upon the very right [to the soil] itself."

A subject may have a port, and either with or without the soil.

2d. "That a subject having a *port* of the sea, may have, and, indeed, in common experience and presumption, hath the very soil covered with the water; for it is true the franchise of a port is a different thing from the propriety of the soil of a port, and so the franchise of a port *may* be in a subject, and

the propriety of the soil may be in the King, or in some other, yet, in *ordinary usage and presumption* they go together.”⁵

“ If the King at this day grant, *portum Maris de S*, the King having the port in point of interest as well as in point of franchise, it may be *doubtful* whether at this day it carries the soil, or only the franchise, *because it is not to be taken by implication*. But surely, if it were an ancient grant, and *usage* had gone along with it, that the grantee held also the soil, this grant might be effectual to pass both, for both are included in it.”

q. Whether the grant of a “port,”—without more words, will carry the soil?

The learned author then proceeds to say, “ *and so* if by prescription or custom, a man hath *portum maris de S.*; in ordinary presumption he hath not only the franchise, but the very water and soil within the port, for a “*portus maris*” is *quid aggregatum*, as a manor; and such a prescription may carry the soil as well as the franchise; and though this does not always hold, yet most times it doth.”

If a man have a port, by prescription, that will carry the soil?

“ *Escaetria, 12 E. 1. n. 1. Portus et piscaria et mariscus de Topsham spectant ad*

⁵ It may be argued, that if the franchise of a port be prescribed for, and the port be dried up, and no longer a port, the prescription is

lost, and consequently cannot exist to give title to the soil so left dry, see p. 80, ante.

Amiciam comitessam Devón. She had not only the franchise of the port, but the soil of the port, and the fishing and salt marsh adjoining. And vide the case of the port of Plymouth, parcel of the manor of Trematon, wherein it will appear that a subject, as he may be owner of a port in point of franchise, so he *may be* owner of the very soil of the haven in point of propriety. And so concerning the port of Poole: the Earl of Surry was owner of it in point of propriety, as well as franchise, and had the anchorage of ships there, which seems to be ordinarily a perquisite in respect to the soil."

3d. "That a man who is not owner of a port in point of franchise, but the franchise of the port belonging to the King, yet, such a subject *may by usage* have the very propriety of a creek or arm of the sea, parcel of that port, and of the soil thereof; and may have, upon that account, the increase of land that happens by the recess of the water of that arm of the sea."

Case of the
Prior of
Christchurch,
de Jur. Mar.
34.

"Register, 252. The Prior of Christchurch Cantuaria petitions the King, quod quum quædam antiqua trenchea, qua se ducit a brachia maris vocata A, versus villam de B, *quæ est in solo ipsorum Prioris et Conventus*, per sabulonis et arenam maris jam de

novo taliter sit obstructa, quod naves per trencheam illam isque ad dictam villam de B venire nequeant ut solebant; et quædam alia trenchea ducens ab eodem brachio maris usque ad eandem villam de B. jam vi maritima facta existet, per quam naves et batelli a mari usque ad villam illam commode et sine impedimento poterunt transire. An “ad quod damnum” issues to enquire, “si sit ad damnum vel præjudicium nostri aut aliorum, seu nocumentum dictæ villæ de B, si eis *licentiam concedamus* quod ipsi dictam antiquam trencheam omnino obstruere et commodum suum inde facere possint.” Lord Hale then observes,—“here “the *common passage* for ships to a town “*admitted* in point of *propriety* to belong to “the Prior, and that they may make profit of “the soil being stopt up.”

This, however, it may be observed, does Comments. not seem to be a correct conclusion drawn from the case; the trenchea or common passage seems to have been *admitted* to belong to *the King*, whose *licence* was asked for the conversion of it to profit; there is no admission that the Prior could appropriate the soil of it without the King's licence.

The learned author proceeds to inform us, “that though the subject may have the propriety of a navigable river, part of a port, yet these cautions are to be added; viz.

1st. "That the King hath yet a right of empire or government over it, in reference to the safety of the kingdom and to his customs, it being a member of a port."⁸

2d. "That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects, as the soil of an highway is; which, though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people which may not be prejudiced or damnified."

⁸ An ancient survey of the King's ports, is lodged in the Exchequer. Gilb. Evid. 69. The same, it is presumed, as that noticed by Selden, lib. 2, ch. 22, where he states that James 2d, in 1604, ordered 12 surveyors, "*rerum maritimarum callentissimis*," to survey the coasts of England, and to fix on certain headlands, or points, by drawing strait lines from point to point, to fix the limits of the King's chambers, "*regias cameras, et Portus regios*." This map, or chart, was drawn on a plate of brass, and published by the King's proclama-

tion. (Procl. 1, martii 2, Jac. 2d, 1604, in Rot. Pat. part 32.) The spaces in the sea, enclosed within the strait lines, are 27. These "*regias cameras*" King's Chambers, are named as follows,—Holy Island, the Sowter, Whitby, Flambo-rough Head, the Sporne, Cromer, Winterton-nesse, Easter-nesse, Layestoff, Est-nesse, Orfort-nesse, the North-foreland, the South-foreland, Dungenesse, Beach, Dunenose, Portland, the Start, the Ramme, the Dudman, the Lizard, Lands-end, Milford, David's-head, Beardsie, Holyhead, and Mona-insula.

The learned writer then observes as to Islands:—

3d. “As touching Islands arising in the sea, or in the arms, or creeks, or havens thereof, the same rule holds which is before observed touching acquests by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie* it is true they belong to the Crown;¹ but where the interest of such districtus maris, or arm of the sea, or creek, or haven, doth in point of propriety belong to a subject, either by charter or by *prescription*, the islands that happen within the precincts of such private propriety of a subject, will belong to a subject, according to the limits and extent of such propriety. And, therefore, if the west side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the *filum aquæ* invironed with the water, the propriety of such island will entirely belong to the lord of that manor of the west side; and if the east side of such an arm of the sea belong to a manor of the east side *usque filum aquæ*, and an island happen between the east side of the river and the *filum aquæ*, it will belong to the lord on the east side; and if the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the

Islands, these belong to the Crown.

Unless formed out of a place the propriety of a subject.

These will belong to the subject.

¹ See accord. Callis, p. 45, 47.

middle between both the *fila*, the one half will belong to the one lord and the other to the other. But this is to be understood of islands that are *newly* made; for if a part of an arm of the sea, by a new recess from his ancient channel, incompass the land of another man, his propriety continues unaltered. And with these diversities agrees the law at this day. And Bracton lib. 2, cap. 2, and the very texts of the civil law² vid. Digests lib. 41, de acquirendo rerum dominio legibus. 7, 12, 41, 29, 30, 38, 50, 56, 65. et ibidem, lib. 43, tit. 12, de fluminibus l. 1. & 6. Vide Bracton ubi supra, Habet etiam locum hæc species accessionis in insula nata flumine, quæ si mediam partem fluminis teneat, communis eorum est qui pro indiviso ab utraque parte fluminis prope ripam prædia possident, &c. For the propriety of such a new accrued island follows the propriety of the soil before it came to be produced."

Comments on
the foregoing
quotations
from Lord
Hale.

The foregoing pages of quotation from Lord Hale's treatise have been given at length, because they embrace all that is generally laid down as *good law* upon this part of our subject, and also some other points, perhaps, questionable. He first of all agrees with all other law authorities, that the *derelict* land belongs to the King. He further states it as law, (and it is apprehended to be sound law,)

² But by the Civil Law, "dantur primo occupanti." islands formed in the sea, Just. Inst.

that *custom* or *prescription* cannot entitle the subject to *relict lands*;³ and that it was decided by a case he quotes, that lands acquired “per relictionem maris,” are not prescribable as part of a manor, or as belonging to the subject,⁴ and we are also told “that the soil [which was] under the water, must needs be of the same propriety [when left dry] as when covered with water;” so that, if, while it is covered with water, it be the King’s, it cannot become the subject’s *because* the water hath left it.” We are, however, soon after told⁵ that the “subject may by *usage* and *prescription* acquire an interest in so much of the sea as he may reasonably possess, as a districtus maris, a place in the sea between two points, or in a particular part contiguous to the shore, or of a port or creek, or arm of the sea. These,” says he, “*may be prescribed* in point of interest, both of the water, and the soil itself, covered with the water.”

Custom cannot entitle a subject to relict land.

Soil which was covered with water does not change ownership by becoming dry.

According to this doctrine, land, which when aqua cooperta *can* be prescribed, for by the subject, *cannot* be prescribed for when relict by the sea. If the soil covered with water was the subject’s before, (and according to Lord Hale’s doctrine it may be so by *prescription*, so long as it is covered with water,) then, says he, such soil when dried up would

q. Whether a portion of land covered with sea, may be prescribed?

³ See ante, p. 152.

⁴ See accord. Dyer, 326.

⁵ P. 153, ante.

⁶ P. 154, ante.

belong to him who was such owner. But it may be asked, how does he prove himself to have been such owner when it was under water? The answer is, by *prescription*; and yet it is insisted that he cannot prescribe for derelict land at all! Surely this is *in effect* prescribing for the very same land. It may be fairly urged, that if land under the water may be prescribed for, against the King's *prima facie* title, the *same* land when left dry may or rather must also be prescribed for,—because “it must needs be of the same “propriety as it was when covered with “water.”

Example.

Suppose I have always claimed (but without having any actual *grant* to show) the ownership of a certain districtus maris, and have never had the title questioned, and it suddenly becomes dry land; can I *prescribe* that it was mine when under water, and thus acquire a title to it? If I can do so, this is virtually prescribing for the derelict land.—The law of England, however, makes no distinction between land covered and land not covered with water; both are “*land*,” technically speaking; and therefore, it seems a contradiction in terms to say that land covered with water can be prescribed for, and land relict cannot. Undoubtedly, if the subject had no legal ownership in the soil under the water, against the King's title, such subject can have no better title to it when it is

relict and dry. This, however, does not explain why land covered with the sea may be prescribed for, and the same land left uncovered may not. Indeed, according to what has been before urged, neither the one nor the other can be made good, in point of title, by prescription; both being merely land, and therefore not lying in prescription.

The doctrine that if, by prescription, a man
 "hath portum maris de S. in ordinary presump-
 "tion he hath not only the franchise, but the
 "very water and *soil* itself within the port,"
 rests also on doubtful ground, if the author's
 distinction be sound, viz. that the *port* or
franchise, and the *soil*, do not *necessarily* go
 together: "the franchise of a port," says
 he, "is a different thing from the propriety of
 "the soil, and so the franchise of a port may
 "be in a subject, and the soil in the King or
 "some other."⁷ Now, if this be the case, it
 does not appear why they should, in *or-*
ordinary presumption, go together under one
 word, *portus*. The learned writer doubts⁸
 whether the *express* grant of a *port* would, at
 his time of day, without more words, carry
 the soil; but conceives that an *ancient* grant
 of the port, coupled with ancient usage,
 would carry the soil. All grants of ports
 are now to be deemed ancient grants; no

q. Whether
 prescription
 for the fran-
 chise of a port,
 will carry the
 soil?

⁷ See p. 156, ante.

⁸ See p. 156, ante.

modern grants (at least including the soil) can be made: are we then to construe every ancient grant of a port, without more words, as giving inclusively a title to the soil? Undoubtedly, if the mere prescription for a port will carry not only the franchise, but the soil, by reason that "*portus*" is *quid aggregatum*,¹ like a manor, then indeed there can be no just reason why the word "*portus*," in a *grant*, should not also have the effect mentioned.

Whether the word "*Portus*" in a grant will pass the soil as well as franchise?

But, it may be asked, why in any case should the mere word "*Portus*" carry the soil, as well as the franchise, if the soil and the franchise are (as they are stated to be) separate ownerships, and capable of being possessed by different persons, and are sometimes so held? The franchise should rather be deemed an adjunct to the soil, than the soil to the franchise, and yet it is no where said that the ownership of the soil carries the franchise. It is not intended to be denied that one person *may* have *both*; but it may be doubted whether the word "*Portus*" will, in any case, carry more than the *franchise*; and consequently it is presumed that the grant must contain sufficient words of grant of the soil. It would be singular, in such a case, to allow the *soil* to be *prescribed* for, when the

¹ P. 156, ante.

port only is actually *granted*; and if an express grant of the port, without more words, will not carry the soil, it is difficult to admit that the mere prescription for a *port* will give the soil also. Prescription, or presumption, ought not to give more than the express grant (supposed to have had existence) would have given; especially against the Crown.

There can be no good reason of policy for thus construing the grant beyond its letter, or conferring the soil of a port on a subject by presumption or prescription. Where the port had better have been, the soil may as well remain. There can be no occasion to strain points of legal doctrine, the effect of which will be to deprive the King of that which was vested in him for the good of the public. The cases quoted by Lord Hale, in support of this doctrine, do not seem to warrant the conclusions drawn from them. Thus we find the words of the first case, “*Portus et piscaria et mariscus de Toppesham spectant ad Comitissam Devon,*” are deemed sufficient to prove that not only the *franchise* of the port, but the *soil* of the port also belonged to her. Now, the “*piscaria*” is not the soil of the port; nor is the “*mariscus*” *adjoining*, the soil of the port; and therefore all that the words *per se*, give, is the franchise of the port, the fishery, and the adjacent marsh; and the word “*port,*” even in his

own admission, may, or may not carry the soil. Nothing appears to warrant a construction beyond the franchise, the fishery, and the adjacent marsh; yet, in a subsequent part of his work,² he draws similar conclusions more fully from this case; where, after quoting the case of the port of Toppesham in the same short form as above, he adds,—it appears,

“ 1st. That the Earls of Devon had the propriety of the soil of the port by *prescription*; for they had all the profits that arise by reason of the property of the soil; viz. the *fishery* and the salt marsh, which possibly might be an “*incrementum maritimum*.” But upon this it may be observed, that the salt marsh was *adjoining*, and might well pass *eo nomine*; and there is no more ground for construing “*mariscus*” into a grant of the soil of the *port*, than for holding the grant of the “*portus*” to be a grant of the “*mariscus*.” As for the “*piscaria*,” it seems impossible to convert *that* into a grant of the soil itself, for a *piscaria*, it is admitted on all hands, often exists independent of the soil, where the soil is clearly in the King, or another; this has been already shown. Besides, the words “*spectant ad C, D,*” prove nothing on the point of *prescription*. But he proceeds,—

“ 2d. They had also the franchise of the port,

² P. 55.

by prescription, and all the incidents thereof,
viz.

1. Applicatio navium,
2. Exoneratio navium,
3. Mercatum et venditio mercandisarum et
per retail,
4. Victualling of mariners and ships,
5. Lodging and entertainment of mariners.

“ All which are privileges in a special manner belonging to ports, and cannot be had without that liberty legally vested.”—All which may be true enough, and yet not prove the *soil* to pass by the word “ portus.”

The next case cited by the same learned writer is that of Plymouth and Sutton Pool.³ “ P. 10. Ed. 3d, B. R. Rot. 73, dorso, it appears, that Willielmus Denlarena Comes Surrey, had the port of *Pool* and anchorage and other duties belonging to it.”

“ It appeared among the charters of the Duchy of Cornwall, the transcripts whereof remain in the receipt of the Exchequer, that Rogerus de Valletort-avantort, gave to Richard King of the Romans and Earl of Cornwall, and the heirs of his body, *Castrum* [castle] de Trematon, et 59 feoda militum, in Cornwall et Devon, ad idem *castrum* pertin :

³ P. 56.

ac etiam *manerium de Trematon*, et villam de esse, CUM AQUA."⁴

"To this castle of Trematon belong a certain petty manor called Sutton Vantort, and also the water and port of Sutton; for so appears by the close roll, Claus. 17. E. 2. m. 14. Sutton *cum aqua et portu* spectat ad castrum de Trematon."

"By the death of Edmond, his son, without issue, the earldom and this castle came to the Crown. Possibly Richard, Earl of Cornwall, after issue had, made some alienation before the statute of Westminster, 2d, whereby the reversion to the heirs of Vantort was barred."

"The earldom of Cornwall and this castle of Trematon descended to King Edward the 3d. He, by *charter*, in parliament, grants the earldom of Cornwall to his eldest son, "et castrum et manerium de Trematon, cum villa de Saltash, et parco ibidem cum aliis pertinentiis." See the Charter, 8 Rep. 8. The prince's case.

⁴ Nothing passes by the word "aqua," save a fishery. "If," says Lord Coke, "a man grant aquam suam, the soil shall not pass, but the piscary within the water passeth therewith." Co. Litt. 4 b. Plowd. 154, says, that by "aqua, a piscary shall pass; and he

adds, that "by a grant of a piscary, the soil shall pass;" by which it might be inferred that "aqua" will carry the soil. But in a former page it has been contended, under strong authority, that a grant of a "piscary" does not carry the soil.

“ By this grant,” says Lord Hale, “ without any special mention of the *water* or *port* as belonging to it, the port and water of Sutton, now Plymouth, was annexed to the duchy of Cornwall, for though the charter grants “ *prisas et custumas vinorum necdum* “ *proficua portuum nostrorum, intra eundem* “ *Comitatum Cornub. simul cum wrecco maris,* “ *et balena, et sturgeono,*” yet that did not extend to the *water of Sutton*,⁵ which was in Devon, but it [the water] passed by the strength of its being parcel of, and appendant to the castle of Trematon.”

“ The *town of Plymouth*, which is indeed caput portus from whence the port now takes its denomination, *was not part of Trematon*, but built upon the *manor of Sutton Prior*, and was incorporated, and its jurisdiction settled by act of parliament. Rot. parl. 18 H. 6. n. 32. and confirmed by rot. parl. 3 E. 4. n. 45. But always in both, whatever was *parcel of Trematon* was *excepted*; and consequently the haven [portus] itself, (which was parcel of Trematon,) was not annexed thereby to Plymouth, but stood upon the same foot of interest as before.”

“ There lies adjacent to this town, [of Plymouth] within the barbican thereof, a space of about thirty acres, which is covered *every* tide

⁵ But see last note.

with the sea, and ships ride there, and come to unlade at the keys of Plymouth, commonly called *Sutton Poole*; for the interest of the soil of these thirty acres, being parcel of the port, an information of *intrusion* was, as directed out of the Exchequer chamber, preferred against the Mayor and Commonalty of Plymouth. The defendants pretended title to it as parcel of the town of Plymouth, and showed *usage* to have had certain customs, called land leave, tarrage, &c. But these referred to the *shore* rather than to the place in question.⁶ They allege that it was also within the limits of their charter, and that they exercise *jurisdiction* of their courts there; both which were admitted. But it was insisted upon, on the other side, that the *soil itself was excepted*, as *parcel of the castle of Trematon*; and it was showed that the King had used to have in right of his duchy in the place in question, anchorage, basselage, fishing, and the rents of fishers, and divers other port duties that savoured of the soil; as appears by divers accounts of the duchy; divers records mentioning *Pola de Sutton* was parcel of Trematon; several leases made by the King's progenitors of *aqua et Pola*⁷ de Sutton; and

⁶ Sed qy, if it was regularly covered by the ordinary tides, this place was also *shore*?

⁷ Although, as before observed, "*aqua*" will not pass the soil, (see note to p. 172 ante), yet the words "stag-

num," or *pola* (forsan?) a pool,—"*gurges*," a deep pit of water,—"*palus*," and "*mariscus*," a marsh, will pass the soil, being *quid aggregatum*, see Co. Litt. 4 b. So a "*boilourie*" of salt, and "*saliva*," or "*selda*," both

some to the town itself, or some in trust for them; and divers other weighty evidences for the propriety of the soil of Sutton Pool; being the very harbour itself, and belonging to Trematon: and accordingly a verdict given for the King." The learned writer then adds, "I have mentioned this the rather because,—

"1st. Here the very interest of the port, and water, and *soil*, and port duties themselves, were claimed and recovered by the Crown, not upon any prerogative title; for, if it had been so, it would have passed to the town of Plymouth, being within the precincts of their incorporation, and *grant*; and then the exception of Trematon had not been available, but as parcel of and belonging to a manor that was formerly a subject's."

"2d. That the King, *primâ facie*, hath a right to ports of a royal franchise, yet the accession of this manor to the Crown did not sever the interest of the port from the manor, no more than in case of a fair or market ap-

of which signify "a salt pit. Co. Litt. ib. So also the word "*marettum*" signifies soil lying between the flux and reflux of the sea, and "you shall read," says Lord Coke, "that such a "man perquisivit trescent "acr. maretti. Co. Lit. 5 a. So also the word "seagrounds" will pass a portion

of shore. *Scrutton v. Brown*, ub. sup. And since there are so many words and phrases, capable of passing the shore in any given spot, to say nothing of the word "shore" (*littus*) itself, there seems less reason for giving to other words a forced or far-fetched import.

pendant by prescription ; for if, by the accession to the Crown, it had been divided from the castle, or manor, it could not have passed, without special words, to the Prince, as it plainly did here. As the *port* was by *prescription* parcel of the manor of Trematon, so it continued parcel, notwithstanding the accession thereof to the Crown, by the death of the Earl of Cornwall without issue ; and it passed, together *with the castle, by the general grant of it*, as a leet or market, or any other parcel or appendant ; and so, not like those flowers of the Crown which are rendered disappendant by the accession to the Crown, as waifs, strays, &c.”

Comments on
the case of
Plymouth and
Sutton Pool.

With regard to this last cited case, the result undoubtedly was, that the King retained both the soil and the port of Sutton Vantort ; but it does not seem so clear that he retained it as appendant by *prescription*. As to the franchise of the port, it is not meant to deny that a franchise may be *appendant to a manor* by prescription ; but the case by no means proves that the *soil* of the sea, or an arm, or port thereof, *may* be in like manner *appendant, by prescription, to a manor*. It is to be remembered that *the soil of the port* belonged to the King, before it was a port, and does not appear to have ever been divested from the Crown at all ;⁸ and

⁸ The first grant quoted is that to the King of the Romans, and unless the soil in question was “*parcel of*

even if his ancestors had granted it away as parcel of the land of the manor, yet when the whole fell again to Edward 3d, he became possessed of the soil in his ancient title. His descendant, king Charles 2d, (for whom the verdict was given,)⁷ was, in the present case, entitled to it in a double right, if possible; for all that his ancestors had once granted away with Trematon and the manor, fell to him again by descent; and if they had never granted the soil, then it was his *ab origine*. The town of Plymouth must have produced either the King's grant of the soil in question, or some tantamount evidence of right to it: and as they failed so to do, even on the disputed ground of prescription, the *soil* necessarily remained to the King, and the franchise of the *port* remained *appendant* to the manor. It does not appear that the evidence adduced on the King's side was necessary to his case, further than concerned the franchise, although it was also used to rebut the claim to the soil. The grant to the King of the Romans was of the castle and manor of Trematon, and the town, *cum aqua*, [and "aqua" carried the fishery only,] and the manor of Sutton Vantort, and als othe *water* and *port* of Sutton Vantort, were admitted to belong to the *castle*; i. e.

the castle and manor of Trematon," at the time of this grant, by metes and bounds, —(and nothing appears to show whether it was or was

not),—it was still in the Crown, for the words "*cum aqua*," did not pass more than a fishery.

⁷ Mich. 16 Ch. 2. in Scac.

to be appendant to it. The castle, the manor, the town *cum aqua*, all fell to King Edward by descent, and he, by a somewhat different form, granted “castrum et manerium de Trematon cum villa de Saltash et Parco ibidem “cum *aliis pertinentiis*,” without any mention of the *port* or *aqua* of Sutton Vantort. The town of Plymouth being built on another manor, viz. Sutton Prior, was no part either of the manor of Trematon or of the manor of Sutton Vantort; and the soil in question was clearly part of the port or pool of Sutton Vantort, which was parcel of the greater manor and castle of Trematon.⁸ The *charter* of the town contained *an express exception of whatsoever was parcel of the castle and manor of Trematon*; and therefore, clearly Sutton Vantort, both pool and manor, were doubly excepted; first, if parcel of Trematon; and secondly, from being within a different manor from Sutton Prior, viz. Sutton Vantort, which, at all events, was not belonging to Plymouth. If the pool and soil of Sutton Vantort did not pass by the grant of King Edward, as a *less* within a *greater* manor, then it remained in King Edward, and subsequently, by succession, vested in King Charles; and if it *did* so pass to the Prince of Wales, then, through him, it came also to the crown, and by the crown it was *excepted* by the words of ex-

⁸ By the name of *castle*, one or more manors may pass. Co. Litt. 5a.

ception in the charter, so that quacunque, &c. the town of Plymouth had no title. But surely this is no evidence that land covered with the sea, may be *prescribed for*. It was admitted on all sides that Sutton Vantort, cum aquâ et Portu, spectant ad [belong to] castrum de Trematon; and it was clear that Trematon was excluded, totidem verbis, from the Town Charter, and was vested in the King. The King, therefore, did not prescribe at all, for he produced written evidences of his title, and had his *original common law right besides*. In fact, all that did not pass from the crown by the original grant to the King of the Romans, in the first instance, was the King's soil by common law; all that *did* pass by that grant came afterwards to King Edward, by descent; and all that King Edward granted to the prince, and also all that did *not* pass in the grant to him, but was crown property *ab origine*, became ultimately vested in King Charles; so that in him, at the time of the dispute, all title centered, save what the town possessed by their charter, and there it was not to be found. Lord Hale also cites in this place, in support of the same doctrine, the case of the Barons of Barclay⁹ already quoted; but which case, if referred to, will not appear to establish the point, that he who prescribes for a *port* thereby also acquires the soil of it; for in that case the King was admitted to

⁹ Barons of Barclay's case, p. 91 ante.

be owner of the franchises of the ports both of Bristol and Gloucester, within the precincts of which the land claimed by the Barons was situate, and yet the land was adjudged to the Barons, whilst the ports remained in the King. The King was, *prima facie*, the lawful proprietor of the soil, and was also the owner of the port; and according to Lord Hale, the port and the soil ordinarily go together; and yet, it seems, these badges of ownership were not sufficient to outweigh the claims of the Barons, specially proved, to the land.

Distinction
between
"Portus" in a
subject and in
the Crown.

There seems to be this material difference when we speak of "Portus" in the crown,—and the same in a subject. In the crown, the soil and the port are ordinarily united, because the soil is the property of the crown by common law; but it is not so in the case of a subject, whose right to the soil is adverse to the ownership of the King. It is matter of course that the soil belongs to the King, until the contrary be proved. So also the franchise of the port. But in the case of a subject, each of these distinct rights are set up against the King's *prima facie* acknowledged ownership, and it does not seem correct to take the one from the King by implication, because the other is substantiated against him. It is well known, that the *portus* often extends over *several miles of shore*, on both sides of the actual harbour, as happened in the last cited

Barclay case ; and it would seem unreasonable to construe the word "Portus" into a title to such an extent of land, where the franchise alone will satisfy the word, and the franchise and land are fairly and technically distinguished from each other by the law itself. No other cases, save those quoted by the learned writer, present themselves to give colour to such construction : and with regard to the cases or records alluded to, it is not too much to say, that from the manner in which they are reported, it is not easy to collect out of the mass of evidence adduced, what was, and what was not the true ground of the decision.

The principal points of law discussed in the foregoing pages are these ;—

1. That the dominion and ownership of the British Seas, and of the creeks, bays arms, ports, and tide rivers thereof, are vested, by our law, in the Crown.
2. That this ownership includes *aquam et solum* ; both the water, its products and uses, and the land or soil under the water.
3. That such ownership includes the shore, as far as the reach of the high-water mark of the ordinary or neap tides.
4. That the land subject to spring tides, and high spring tides, is no part of the sea, or sea-shore ; but belongs to the title and ownership of the *terra firma*.

Summary of the principal Points discussed.

5. That by grant from the Crown, a subject may have a lawful ownership of a certain portion of the sea, its creeks, bays, arms, ports, or tide-rivers, and of the shores thereof, *tam aquæ quam soli*.
6. But that such grants must have a date anterior to the statutes restraining the alienation of Crown lands.
7. That no distinction exists at law, between the title or proofs of title to such land covered with water, and the title to *terra firma*.
8. That where the ownership claimed by a subject in any such *districtus maris*, or tide-river, or shore cannot be proved by the production of the grant, such ownership can *no otherwise* be established than by adverse possession, under the Statutes of Limitation.
9. That such ownership cannot be supported by "prescription," properly so called, against the King, and never could, at any period, be so supported under the feudal law.
10. That the proofs of title, where the grant itself is not forthcoming, to such *districtus maris aut littoris* must be *paræ materiæ* with those required to prove title to inland estates.
11. That proof, by prescriptive evidence, of a right to a franchise, liberty, or easement in or out of the soil, is no sufficient evidence of title to the freehold and inheritance of the land itself, whether such land be *terra firma* or *pars maris*.
12. And consequently, that the ownership of a several fishery, or of the franchises of wreck, of flotsan, jetsan, and ligan, or of royal fish, or of ports, or the liberty of digging for sand, or shells, &c., will not be suffi-

cient to establish an absolute ownership over the soil itself, where such rights are enjoyed against the Crown.

13. And, therefore, neither the express *grant* of a franchise, or liberty, nor “prescription” for such, (which supposes a grant) can be construed to include the soil, or freehold, against the Crown, by implication, or presumption.
14. That “alluvion,” properly so called, belongs to the ownership of the freehold of the adjacent *terra firma*, subject to such interests in others as such ownership is liable to.
15. That “derelict” land, properly so called, belongs to the Crown, as land suddenly and by manifest marks left by the sea.
16. That islands produced out of the British Seas, and the creeks, bays, arms, ports, and tide-rivers thereof, belong, like derelict land, to the Crown.
17. Unless the soil under the water out of which such islands are produced, previously belonged to a subject.
18. That the title of a subject to the soil of a *districtus maris*, viz.—to the soil of any creek, bay, arm, port, or tide-river, or to the shore, in no substantial respect differs from a title to *terra firma*.
19. That it is more for the public advantage that the ownership of subjects should be limited to the *terra firma*; and consequently, that by the rule of law, as well as of public policy, claims set up to tracts of sea, or of ports, or tide-rivers, or of the shore, ought not to be *favoured* against the Crown.

SUPPLEMENTAL CHAPTER

ON THE

PUBLIC RIGHT TO USE THE SHORE FOR BATHING,

AND FOR

DIGGING AND TAKING SHELLS, SAND, &c.

As to the Right to use the Shore for Bathing.

As to the right
of bathing on
the shore.

THE general right to frequent the shore for sea-bathing was made the subject of legal question, for the first time, in the recent case of *Blundell v. Caterall*.¹ The plaintiff, who resisted the right, “was the lord of the manor “ of Great Crosby, which is bounded on the “ west by the river Mersey, an arm of the “ sea.” It is stated in the report of the case, “ that as lord of the manor he was *owner* of “ the *shore*, and had the exclusive right of “ *fishing* thereon *with stake nets*. The de- “ fendant was the servant at an hotel erected “ in 1815, upon land in Great Crosby, fronting “ the shore, and bounded by the *high water* “ *mark* of the river Mersey, the proprietors “ of which hotel kept *Bathing Machines* for “ the use of persons resorting thither, and “ who were driven by defendant in machines “ across the shore into the *sea* for the purpose

¹ 5 Barn. and Ald. 268.

“ of bathing; and the defendant received a
 “ sum of money from the individuals so bath-
 “ ing, for the use of the machines, and for his
 “ service and assistance. No bathing ma-
 “ chines were ever used upon the shore of
 “ Great Crosby before the establishment of
 “ this hotel; *but it had been the custom for*
 “ *people to cross it on foot for the purpose*
 “ *of bathing.* There was also a common high-
 “ way for carriages along the shore, and it
 “ was proved that various articles for market
 “ were occasionally carted across the shore,
 “ although the more common mode of convey-
 “ ance for such things was by a canal, made
 “ about forty years ago. The defendant con-
 “ tended for a *common law right* for all the
 “ King’s subjects to bathe on the sea-shore,
 “ and to pass over it for *that* purpose on foot
 “ and with horses and carriages.” It was de-
 cided, by *three* of the learned judges against
 one,² that no such *general* right in the subject
 to frequent the shore, *for the purpose of bath-*
ing, existed, whether on foot or in carriages.

Decided in
 Blundell v.
 Caterall, that
 the public
 have no com-
 mon law right
 to bathe on the
 sea-shore.

This was the first case in which the public
 right to use the sea and sea-shore for bathing,
 was ever *judicially* either claimed or opposed,
 as was remarked by Mr. Justice Bayley. The
 case was very fully argued, and the judges
 gave their opinions at considerable length.
 The learned counsel who argued against the

Remarks on
 the case of
 Blundell v.
 Caterall.

² Best, now Lord Wynford.

right, opposed it on *three* several grounds. "*First*, from the silence of the authorities. "*Secondly*, because such a right was contrary "*to* analogies. "*Thirdly*, because it was "contrary to acknowledged and established "rights;" and the three judges, by whom the case was decided, seem to have been governed, principally, by the *first* and *last* of these several grounds of argument.

Remarks continued.

It is to be observed, that the title of the lord of the manor to the absolute ownership of the shore itself was supposed to be proved; and not only the soil of the shore, but also "an exclusive right of fishing thereon with stake "nets," was taken for granted to be the private property of the lord; and, therefore, the particular question was *not* whether the shore was subject to such *general* customary right of bathing, but whether the *private ownership* of such shore, coupled with an exclusive private fishery with stake nets, was subject to such general customary right of bathing. The Court, however, did not confine themselves to the narrow ground of the incompatibility of the bathing with carriages, or on foot, in a place where a private fishery with stake nets existed; on the contrary, they decided upon the broad ground, that a general common law right did not exist at all, by ancient custom and usage, of frequenting the sea-shore for bathing. It was taken for granted, on all hands, that the

original ownership of the shore is in the Crown; and that even the King's ownership was subject to the common law rights of fishing and navigation; and also, that the subject who became owner of the shore by the King's grant, was as liable as the King to those customary rights; but it was denied that either the King's, or a subject's ownership of the shore was subject to a like general common law usage of bathing.

With regard to the *silence of the books*,^{Silence of the books as to the right of bathing.} the Court said, "that no trace of such a right " was to be found in the books." But it seems to have been admitted that the " books" were not the *only* authorities for or against such right; for the Court also said, "that the existence or the extent of the subject's right " was to be collected in this, as in other instances, from the *manner in which* the sea-shores throughout the kingdom have been " from time to time immemorially used; as " well as from legal authorities." Now the silence of the books may, in some cases, be alleged to testify the extreme certainty of, and general acquiescence in a right. The custom in question would seem to be a right of all others the least likely to become the subject of legal dispute. The silence of the books in respect of a custom so natural and universal, may be thought to make as much *for* as

against the usage:³ nor can the mere silence of the books be deemed a sufficient negative of a custom. If, indeed, the practice of bathing has generally prevailed, time out of mind, throughout the realm, the silence of the books gives consent rather than denial. The right in question was a case of *custom*, and by the *dicta* of the judges themselves, we are permitted, in the absence of all book authority, another distinct ground for decision, viz. "immemorial usage," which is the very essence of the common law itself.

Antiquity of
the custom
and its uni-
versality.

It is not easy to point out a custom more universal, more natural, or more ancient on

³ It is admitted, that in some cases, "the silence of the books may be eloquence," as Lord Ellenborough expressed it in *Aubrey v. Fisher*, 10 East. 456. But *that* is where some singular custom differing from, or opposite to the general custom, is set up, and no mention or allusion made in the books to the opposite and particular custom. Thus in the case alluded to, the general custom of the *realm* was that trees under twenty years' growth were, if cut, to be deemed underwood, and titheable, but trees of twenty years' growth and upwards were deemed *timber* trees, and not titheable. A custom was set up in *one County*, that if the tree did not con-

tain ten feet of solid timber, it was underwood; and his Lordship's remark was applied to this alleged custom, which was deemed not to be good accordingly. In the principal case the custom to bathe is general; and a custom set up, in one district, of limiting the bathing to one class of persons, or to persons of a certain age, or to a certain hour, would be a singular exception to a general rule; and if the books were silent about it, might well be denied. But it would be strange to construe the silence of the books into a denial of a custom *which has actually existed universally and immemorially*, and which, therefore, has always spoken for itself.

the sea-coasts not of England only, but of the whole world, than that of bathing. We know that the natives of the British Islands have been, from time immemorial, famous for their skill and intrepidity in the art of swimming. The most barbarous and the most civilized nations in all parts of the globe have equally practised bathing and swimming. So far from the silence of our books being a good authority for the non-existence of this right, it would have been the more singular circumstance of the two to have found the point in any way disputed. The constant enjoyment of this privilege for ages without dispute, would, it might be supposed, have proved sufficient to establish it as a common law right, similar to that of fishing in the sea. It is difficult, indeed, to imagine a general and public right of fishing in the sea, and on the shore, unaccompanied by a general right to bathe there.

It is true, that if the natural instinct or habit of man to bathe be *alone* sufficient to establish such right, it would confer a right to bathe in rivers, streams, lakes, &c., which not being subject to the tides, are no part of the sea. But it is not the inclination alone, but the universal and habitual practice which is necessary to establish such a right; due regard being also had to the nature of the ownership

Distinction between the custom as claimed in respect of the sea, &c. and inland waters.

in the *locus in quo*. Rivers and lakes, &c., not subject to the tides, being no part of the sea, are no public highway, no "great waste" subject to public use for fishing, navigation, &c. They are, by our law, private property to all intents and purposes. The analogy, therefore, does not fully hold; but even in this case it may be doubted whether a custom, proved to have existed time out of mind, of bathing at a particular place, in any river or lake, by the inhabitants of the adjacent parish, town, or district,—especially where a common of piscary exists,—may not be reasonably supported as an easement or liberty, on the same principle as a right of way. However this may be, the nature and degree of these habits amongst a maritime people, dwelling on the sea-coasts, and addicted to navigation and fishing, are not to be considered on precisely the same footing as the habits of an inland people. We are, nationally, a maritime people, and general customs should be tried by the national habits and pursuits of such a people.

The text of Bracton as favouring the right.

In the case before us it was argued, that although no express mention is made of bathing as a general common law right, yet the common right to frequent the shore, (*littus*), without limitation of purpose, (so that it be legal,) is expressly asserted by Bracton. The learned

judges, however, who decided the case, considered Bracton not only to have *quoted*, but to have *interpolated* this doctrine from the *Civil* law; and that the *Civil* law and our law do not agree. Mr. Justice Best, (who dissented from the decision of the Court,) replies to this reasoning, "that Bracton has not *stated* "this right as civil law; he has made it part "of his book '*de legibus et consuetudinibus Angliæ.*'" It appears, in fact, that the passage actually referred to and contradicted by the three learned judges, as being a mere transcript from the civil law, relates *not* to the *sea-shore*, but to the *banks of rivers*. There is a *separate* section in the Institutes relating to the sea-shore, which says, "LITTORUM quoque usus publicus est jure gentium, sicut et ipsius maris;"⁵ and *this* passage, nearly in the same words, Bracton has also;⁶ although the learned judges commented on the text relating to *river banks*, viz. "*RIPARUM* etiam usus publicus est, jure gentium, "sicut ipsius fluminis,"⁷ which, at this day, is certainly not deemed, in its fullest extent, good law.⁸ The reasoning, therefore, seems to have been this, Bracton is wrong in his law that "*RIPARUM usus communis est, &c.*" therefore, "*littorum usus non est communis.*" But this

⁵ Just. Inst. Lib. 2. Tit. 1. sect. 5.

⁶ See p. 117, ante.

⁷ Bracton, lib. 2, ch. 12, sect. 6.

⁸ Ball v. Herbert, 3 T. R. 253.

is certainly a "*non sequitur*;" and although the Court, from authorities, proved Bracton to be wrong, to a certain extent, in his law respecting particular uses made of banks of rivers, (as for towage), yet no authorities were adduced shewing that the "*communis usus*" of the *sea shore* for bathing, is not a good custom. It has been before shewn that Bracton does not copy or follow the civil law in certain points relating to the sea and sea-shore. For whereas the language of the Institute¹ is, "*prietas autem eorum potest intelligi nullius esse*," the text of Bracton contains no such doctrine. Thus it is evident he did not merely copy the Institutes, since he has wholly omitted a most important sentence, which, as we have amply shown in former pages, is not law with us, whatever it might have been with the Romans.

Distinction
between "*ri-
pam*" and
"*littus*."

The *ripa* or bank, and the *littus* or shore, are not one and the same. The *ripa* is *terra firma*, and generally cultivable, and therefore damageable in its crops and produce. But the *shore* is covered twice every twenty-four hours by the "tide," and partakes of the nature of sea-bottom, and is by Lord Hale himself distinguished from "*terra firma*," and classed rather with sea-bottom. In legal

¹ Instit. lib. 2, title 1, sect.

parlance, indeed, shore, sea-bottom, and *terra firma* are all, technically, *land*: still, however, with this further technical distinction, that a grant of so many acres of *land*, without more words, will include no more than the “*ripam*,” and will not include the “*littus*,” nor any portion of land covered with water, unless so specially described. Wherefore, it is evident that the two words, *ripam* and *littus*, are not quite identified with each other; nor does a negative applied to a right claimed in respect of the one, necessarily touch or disaffirm a right claimed as to the other.

It may be safely admitted, that the banks of rivers not subject to the tides are not so open as *Bracton* represents, without admitting any mistake, to the same extent, as to the sea-shore. Few (if any) of our *old* law writers are deemed better authority than *Bracton*; and if we are to assume that because he is wrong in one case, and the law is since altered in another, therefore, in a third and different case he must also be wrong, what law writer have we who can pass such an ordeal? Mr. Justice Buller, in the case of *Ball v. Herbert*,² (which related to towage on the *banks* of a navigable river,³) observes on the passage of *Bracton*, “*riparum usus*,” &c.—“It plainly

The text of *Bracton* as it bears on this distinction.

² 3 T. R. 253.

³ *Quære*, tide river?

“ appears to have been taken from Justinian,
 “ and is only part of the Civil law ; and whe-
 “ ther or not it has been adopted by the
 “ Common law is to be seen by looking into
 “ our books, and there it is not to be found.”⁴
 But, it may be asked, what are “ our books ”
 if Bracton be not one? and if Bracton be not
 contradicted by other authorities or customs,
 he is, *prima facie*, an acknowledged law writ-
 ter of authority.

It does not
 necessarily
 follow that
 because Brac-
 ton's text is
 taken from the
 Civil law, that
 the doctrine
 may not be
 good at Com-
 mon law.

Now, as the books are totally silent in regard
 to *bathing*, (which is one part of “ the com-
 munis usus littorum,”) and silent also as to
 several other common uses to which the shore
 may be applied, the authority of Bracton, as
 to the right of the public to *make use* of the
 sea-shore, might be deemed good authority
 for all such customary uses made of it as are
 uncontradicted by the books, and not incom-
 patible with other unquestionable rights, or
 the known laws of the land. There is nothing
 singular in the laws of two different nations
 agreeing in their permission of a custom so
 natural as bathing. The habit of bathing is
 as natural to a native of Britain as to a Roman;
 much more so, indeed, if the effect of insular

* The judges, in the prin-
 cipal case, quoted the words
 of Judge Buller as appli-
 cable to Bracton's doctrine
 relative to the sea-shore ;

although they were not so
 applied by Judge Buller
 himself, but to banks of
 rivers.

habits (and habit is second nature) be considered. It would have been more singular if the *Civil* and *British* laws had not agreed in throwing open the sea-shore for purposes of public use common to all mankind.

The coincidence of phrase adopted in expressing such legal right, can be no sufficient ground for rejecting the law. The phrase may be borrowed, and yet speak the law of the land. If the law were as singular as the phrase, that might be a rational ground for doubting whether the law, as well as phrase, be not *foreign*; but in a case where it is so natural that all nations should think, and act, and legislate alike, it seems not reasonable to hold that the law is foreign because one of our jurists, writing in latin, borrows a latin phrase or sentence. Our early law writers wrote in the language of the Civil law, and not in their native tongue; the language of the Civil law was the language of our Courts in early times, though the law itself might differ; and many sentences in our early Latin writers might be pointed out, which lay down the undeniable Common law of England in the same words by which the Civil law expresses the same rule. Natural reason alone has made the Civil law and Common law to coincide in many points, without borrowing from each other; and if the Latin tongue be used to declare both codes, what wonder if the like

words and phrases of one and the same language be used to express similar laws.

The Roman law and our Common law agree in some points.

There are several points of the Roman law, delivered by Bracton in the language of the Institutes, which are allowed to be part of our Common law at this day, as Lord Hale himself admits. It is clear that our law has either *actually* adopted the Civil law in some points, or has, from the nature of things, coincided with it. The only true question is, whether the matter in dispute be or be not a part of *our* laws and customs? The Common law of England *may* adopt, and certainly has adopted, some detached portions of the Civil law ; and it is not strange or difficult to suppose both these systems of law to have agreed in sanctioning a natural right and habit, coexistent with the earliest habits of the human race. Had the Roman law *first* declared, that to bathe in the sea was *not* a common right, but must be asked or hired from the owner of the shore, and the English law had followed in the same words, it might then indeed be imagined that so strange a restraint in the law of England upon so natural a use of the sea-shore, expressed in the words of the Roman law, was interpolated from that law. But, as regards the point in question, it is a custom common to all nations, and foreign to none.

The custom of bathing pre-

To say that the law was borrowed, is to

infer that the custom did not exist before the time of borrowing. But will it be said that the shore was not as much frequented for bathing *before* that time as *after*? Men were used to bathe and swim long prior to the written codes of Rome or England. The *custom* preceded the *law*, and that which Roman law may have sanctioned by book, may have been already custom, i. e. Common law, in England. It must be admitted, that our law and the Roman law do also *disagree* in *some* points respecting the use and property of the sea-shore; this was, at some length, proved by Mr. Justice Holroyd; but this is no evidence that they do not *agree* in other points. They *do* agree in the common right of fishing; why may they not agree in the common right of bathing? In those points wherein they differ, our books and Common law cause the difference; but do our books and customs create any difference as to bathing? It is admitted that not one expression in our books is to be found *contradictory* to the common right to frequent the sea-shore for bathing; and that bathing is, and ever has been, a *general* custom and practice will hardly be denied; for the habit is coeval at least with fishing and navigation, two acknowledged "*communes usus*" of the sea-shore.

The Court seem to have construed the words of Bracton, "*communis usus*," in an

ceded the law
both of Eng-
land & Rome.

The words of
Bracton not to
be construed

too largely,—
by reasonable
construction
seem to be
good law.

extreme sense; viz., as denying *all* ownership over the shore, even in the King. But it does not appear that the words were intended by Bracton to be understood further than as importing common rights of *usage*, distinct from the "*jus proprietatis*;" nor is it *necessary* to interpret him to mean that the ownership of the soil was *not* (as now held to be) in the King. Indeed, we have just now shown that he wholly omits the doctrine of the Institutes, as regards the "*proprietas*." He must, therefore, be taken to have meant no more than that the shore was a public *common*, open to public resort, and convertible to various public uses, as is the sea. It is in every day's experience that the shore is open "to common use." It is difficult to say what other common uses the shore can be converted to by the public, besides those of a "highway, for the exercise of the fisheries and "navigation," "digging of the soil for manure, "and for materials for building, ballast, &c.," and, lastly, "bathing." The first three of these uses are confirmed by the law; and the digging and carrying away sand, &c. is a right actually affirmed by Statute law to all the inhabitants of two of the largest maritime districts⁵ in England, and has but very recently been disputed as a general right.

⁵ Devon and Cornwall.—
See p. 102, ante.

⁶ In *Bagott v. Orr*. 2
Boss. and Pull. 472.

Thus the language of Bracton would seem to be warranted alike by law and practice in every use to which the *sea* can be applied; whilst one recently disputed instance (the digging of sand, &c.) will not apply to the *sea*, and therefore does not come strictly within his words, which are "*sicut et ipsius maris.*" The sea is a public highway,—so also is the shore. The sea is subject to the public right of fishing and navigation,—so also is the shore; and to what other purposes is the *sea* applied, by *common right*, to which the *shore* has not been at least *equally* applied by *common use*, digging for sand, &c. not excepted? So far therefore, as relates to the "*communis usus*," (exclusive of the barren *ownership* of the soil) the text of Bracton is borne out by matter of fact.⁷ Callis also, quoting from an old text-

Uses of the sea
and sea-shore

⁷ In a very recent case, the King v. Commissioners of Sewers, for Pagham, Sussex, 8 Barn. and Cress. 355, it is laid down by the Court, "that every land-owner exposed to the inroads of the sea, has a right to protect himself, and is justified in erecting such works as are necessary for that purpose." This was said in regard to *groynes*, a kind of work which takes permanent possession of the soil, and is only effectual when constructed upon the "shore." These groynes are piles of

wood carried out from high-water mark, at right angles from the coast, towards the sea, across the "shore." The effect is to accumulate the beach and shingles on the one side into heaps, and which accumulation constitutes the protection sought for. The sea is thus made to shut out itself. This kind of work has, in many places on the coast, produced very extensive accumulations of beach sand, &c., annexed to the adjoining land, and has thus not merely *protected* but *added to* the ownership of the land. How far the subject may assert a claim to the ownership of such soil,

writer, says, "*Rex habet proprietatem, sed populus habet usum ibidem necessari-*

so recovered from the sea, may be judged from what has been already said, viz., that it will depend upon the gradual nature of the acquisition. But with regard to the right declared by the Court in the case above mentioned, it does not appear whether it was meant to be laid down as a general common law right, independent of the ownership of the "shore," or as a right inherent only in the ownership of the shore. Presuming the "shore" to belong to the Crown, (as is to be presumed until the contrary be shewn,) the question is, whether all owners of lands on the coast have a right so to use the shore, such shore being the property of the King? or whether the Court intended to apply the doctrine only to those who were owners of both the land and the "shore?" Such works are, in fact, an *embanking* against the sea, and do not only protect the land from further inroads, but recover lost land from the sea. The question is of importance, as regards evidence of title to the "shore;" for if the right be *general*, and independent of the ownership of the shore, such acts cannot be evidence of *private* right to the shore. And if the ownership of the shore will alone give the right to do such acts, the ownership of the

shore, in point of title, must have existed *before* any such act; and if so, then such act can only be proved *lawful* by proving a pre-existing title to the shore. If the title to the shore must be *first proved* to make any such act *lawful*, the title to the shore must be proved by evidence *dehors* the act itself. Presumption, in this case, is no good title against the Crown. Such acts as these, done by private individuals, are independent of acts done by Commissioners under the Statute of Sewers, 23, H. 8, ch. 5. It will hardly be held that the erection of *one* groyne, by the lord of the adjacent manor, will, after a lapse of twenty or more years, be *per se* sufficient evidence of title to the soil of the shore against the King. One or two groynes will often prove adequate to the protection of several miles of coast; and even occasion very considerable additions to such extent of coast. If, however, the right to erect such works upon the shore be held to be a general Common law right, it is no slight argument in favour of Bracton's doctrine. It may also be remarked, that if by the construction of such works such rapid *additions* are obtained from the sea as the law will *take notice of*, they will belong to the Crown, *unless* those additions have been taken pos-

um."⁸ The practice of bathing and swimming may justly be termed "necessary" to a maritime people. It is true the shore may be converted to other uses than those just mentioned, but not such as are in their nature *open* and *common*; therefore, an *appropriation* or *in-taking* of it is not a "*communis usus*." Now, in the case of a common within a manor, it is well known that the lord of the manor is owner of the soil of the common; but that the tenants have a certain "*communis usus*" of such common, so as to render the "soil" of comparatively trifling value to the lord. He cannot infringe upon the rights of the "commoners," by any in-taking or inclosure of the common. Why cannot this analogy serve for the sea-shore? The common uses to which it has *generally* and immemorially been applied by the public, might as reasonably be supported, as are similar uses of the soil of inland manors, so long as such uses are beneficial to the public; and the ownership of the soil might be made available only in cases where the "common rights" are not injured. The soil of the shore would seem to deserve no better protection on behalf of private owners, than the soil of a common within a manor; on the contrary, a private ownership of the sea-shore, if asserted

session of by sufficient acts of ownership for the period of time required by the Statutes of Limitation, to negative the King's title.

See p. 136 ante; and 2 Anst. 614, Attor. Gen. v. Richards.

⁸ Callis, on Sewers, 54.

and acted upon, is very likely to prove a public nuisance ; and, therefore, deserves no encouragement or support against any public uses which are laudable and beneficial, and have ancient usage in their favour.

As to the immemorial custom of bathing.

But the Court seem to have denied the *continued* and *immemorial* custom of bathing on the sea-shore. Lord Tenterden declared, "that if the right exist now, it must have existed at all times ; but we *know*," he adds, "that sea-bathing was, until a time comparatively modern, a matter of *no frequent* occurrence ;" and he adds, "that he was not aware of any practice in this matter sufficiently extensive or uniform to be the foundation of a judicial decision." But, with great deference, it seems singular to deny the uniformity, universality, and frequent occurrence of bathing and swimming in the sea ; a practice known to exist habitually wherever man and sea-water are to be met with. There is not a village on the coast where the practice will not be found to have uniformly prevailed. Cleanliness, health, amusement, and utility, have all operated to make the custom general on the sea-coast.

Opinion of the Court as to bathing in "machines."

It is true that the *manner* of bathing in "machines," (as his Lordship remarked) may not be either *ancient* or extremely uniform ; but the *right*, and the precise *manner* of exercis-

ing that right, are not the same questions. The right of bathing, and not the right of bathing in "*machines*," is the true question, and was, in fact, the question decided by the Court. It is another question whether the right of way to the sea be open for carriages in some *particular spot* of the *ripam* in regard to the private ownership there. If the public have a convenient approach to the shore, it is enough, without their being allowed to make as many ways as they please, and from mere caprice, over the grounds of others. That the public, in every parish, manor, &c. on the coasts, have a right to one or more convenient ways of approach to the shore, according to the wants, extent, and localities of the district, is not to be denied, since without this, fishing and navigation would be valueless. Nor is it sufficient that such way should be a mere foot-way; and if it be a way for horses and carriages, and I thus have a right to drive down to and along the shore in a machine or carriage, to get into a boat to float on the sea, why may I not do so to get into the sea itself? The right of way to the sea was never yet contended to be a mere *footway*; the same mode of approach to and from the sea as is allowed for fishing or embarkation, is all that is desired on behalf of bathing. As to denying the right to bathe, on the ground that the "*machines*" are a "*modern invention*," it may be

thought that they are rather a recommendation than otherwise in support of a custom, which, in its more ancient practice, was not so decent, or so well adapted to modern refinement.

As to bathing being a privilege inconsistent with private rights.

But it was further declared, by Mr. Justice Holroyd, that “such right of bathing is inconsistent with the nature of permanent private property, as well as inconsistent with the fishing on the sea-shore being also an exclusive right.” Now, with regard to the sea-shore being private property, this does not seem to be a species of ownership worthy of being *favoured* either against the Crown or the public. It was also well and truly said, by the learned Counsel for the defendant, “that no subject, claiming under the King, can claim a greater right than the King had in the shore;” and the true question all along is, whether the King’s ownership in the shore is not itself subject to this usage? The ownership of the Crown in the shore has always been subject to the public right of using it as a road for fishing and navigation. It is evidently not the *sea* alone, but the *shore* also which is subject to these two Common law rights. Thus, the frequenting the shore is claimed and enjoyed as an accessory to these rights, which are the principals. It is like a grant by A, of a piece of ground to B, in the midst of the ground of A, which grant were useless unless

The public have a right of way over and along the shore for fishing, navigation, &c.

B had a right of way over A's ground to the piece of ground granted to him ; therefore, the law implies and gives to B a right of way over A's other ground. So the shore lies between the fishery or navigation and the public, but the public have a right to the fishery and navigation, and a convenient way is presumed over the shore for carrying them on ; such as for launching boats, carriage and footway for the conveyance of the fish, goods, &c. to and from the boats, &c., and for exercising whatever other conveniences common sense and usage point out as *essential* to these rights ; in short, whatever obstruction would render the fishery or navigation nugatory, must be deemed unlawful and incompatible with those rights. But to build houses or docks on the shore, or to form permanent quays or wharfs by the fishermen or traders themselves, (not being owners of the soil,) will be going beyond the essentials of their rights. All such permanent appropriations of the soil are no part of the public rights of fishery or navigation, and should, therefore, be matter of private bargain. The temporary purpose for which the shore is used must be essentially and necessarily subservient to the right claimed, and so far such temporary purpose, it is apprehended, is not inconsistent with private property in the shore. To this extent the Common law right to use the sea-shore, does, it is conceived, prevail throughout the coasts of

England, whether such "*locus*" be a port, or not; or whether it be the King's property or the property of a subject.

A several fishery may exclude the right to bathe where the bathing would injure the fishery.

But if, in addition to his ownership of the soil of the shore, the subject claim a private fishery, such claim, if allowed, is paramount to the public fishery; and therefore no accessory to the public fishery (such as a right of way) can be allowed to injure the private right; for if the public fishery itself yield to the private, the incidents to such public fishery must yield also. Now, assuming the right to bathe to be coeval in antiquity of usage with the public right to fish, (and there are some and the most ancient modes of fishing which require the fisher to immerse himself in the water,) the same evidence which will support the private fishery against the public fishery, and its incidental right of way, will also support the private fishery against the "bathing" and its incidental right of way, so far as it may interfere with such private fishery; and if the bathing, in the case of *Blundell v. Catterall*, under consideration, did injury to the private fishery, and such private fishery was good in title, then the decision of the case was just, *quoad hoc*. Of two incompatible rights, if one be allowed to be good, the other cannot be so; but then the case we have put is similar to the case of a private fishery, excluding the general and public fishery.

It was expressly allowed by the learned Judge, "that, as incident to the fishery, the public *must* have the means of getting to and upon the water for those purposes;" but he adds, "that it will appear, that it is by and from such places only as necessity or usage have appropriated to such purposes." Is it then meant to be laid down as law, that the "sea-shore" is only accessible for the purpose of fishing, in old fishing villages, or sea-ports? Suppose a village on the sea-coast, whose inhabitants never yet launched a boat, are the cottagers precluded from turning fishermen, and approaching and exercising on the shore their Common law right of fishery? It would seem that the whole sea-coast of the realm is the *place* appropriated by "usage and necessity" to the public common of piscary. The right is attached to the person, to every individual of the public body. It is the birth-right of the subject, and he is not bound to exercise his right in one place more than another. All that he has to do is to pay regard to rights declared by the law paramount to his own; but the mere ownership of the soil is no such private right as can bar the *jus publicum* of the fishery. Even the King's ownership of the soil is subject to such right, and the ownership of individuals derived from the crown is not greater.

It is said, by Mr. Justice Holroyd, "that it is not by the Common law, nor by statute

As to the right of way for fishing, &c. on the sea and shore.

As to the right to land from boats, &c. on the shore.

“lawful to come with, or land, or ship customable goods in creeks or havens, or other places out of ports, unless in cases of danger or necessity, nor fish, or land other goods not customable, where the shore or land adjoining is private property.” Undoubtedly, customable goods cannot lawfully be landed except in the ports assigned for their reception, and the payment of duties. The *jus regium* of the King, which entitles him to levy the customs, entitles him, as *Custos portuum*, to appoint the places for the landing and shipping of customable goods; but it is difficult to consider the law as granting the public fishery, and yet denying the right to land the fish upon the *ripam*, as well as *shore*, so far as such *temporary* use of the

“If one has piscary in any water, he has no power to land without the assent of the tenants of the frank-tenement.” Savil, xi. pl. 29, inhabitants of Ipswich v. Brown, 23 Eliz. See Vin. Abr. title Piscary, D. But the fishery here meant is a *several* or *private* fishery. In Ward v. Cresswell, Vin. Abr., Piscary, B.—Defendant in replevin, avows taking six boat oars (from boats hauled above high-water mark) as damage feasant, for that the *place where* was his freehold. Plaintiff pleads in bar of the avowry,—1. A common of fishery in the sea there,

as appurtenant to certain tenements there,—2. A liberty of landing and putting on shore their boats upon the place, for the use of the fishery. It was held that fishing in the sea, being matter of common right, a prescription for it, as appurtenant to a particular township, is void. Accord: the plea in bar was held to be ill. Here the landing and putting up their boats, (which was the damage,) seems to have been regarded as part of the public right of fishery.

¹ 2 Bos and Pull., 472. See this case more fully, post, p. 225.

ripam or of the shore is reasonably *necessary*; such fish to be forth with removed, and not left or marketted there, to cause permanent or unreasonable obstruction to the ownership of the soil.

There can be no doubt whatever but that the public have a right to fish on the *shore*, although the soil thereof may happen to be private property. To exclude the public there must be proved a *several* fishery, as well as an ownership of the soil. The public fishery extends over sea and shore, and there are many kinds of fish which can only be caught on the shore. The case of *Bagot v. Orr*,¹ has expressly decided that the public have a Common law right to take *shell fish* on the "shore," without reference to the person to whom the soil belongs; and, it is presumed, the "fishery" includes all kinds of fish (royal fish excepted) wherever their haunts may be, whether in the great waste of the sea, or upon the shore. With regard to the fish taken at sea, it would be difficult to contend that it would be *necessary* to carry fish to a *port*, before it is landed. The right to land the fish upon the strand nearest where it is caught, would seem to be an essential adjunct of the fishery; the fishery is for the sustenance of the fishermen, their families, and others dwelling on the spot whence they embark; and to require the fish to be landed at a port perhaps twenty miles off, with all the delays of winds, and tides, and office, and land

The public have a right to fish on the *shore*, as well as on the sea.

The public not compellable to land fish caught at sea at the port.

carriage, &c. is utterly destructive of the fishery. It must be presumed, that the Common law right of fishery includes the right to land the fish at the places where it may be most conveniently sold and used for food. Half the fisheries in the kingdom would be ruined if a contrary doctrine prevailed.

As to the right of way along the "ripam" above high water mark.

It is difficult to regard the fishery as a *public* and *general* right, and the necessary way and passage for its exercise as a *local* and *partial* privilege. The public right to navigate the seas, and to fish therein, is not limited to particular places; it is not a local right, but pervades the whole coast of England. The right of way for the exercise of these public rights would seem to be commensurate. But the fisherman or navigator must be ruled by the law, through the verdict of a jury, as to what shall be *sufficient* in the *locus in quo*. The law (for instance) will compel him to take the usual and public road down to the sea side, if there be one within reasonable and convenient distance; but when there, how is he to reach his boat, which may be a mile off along the shore, at the time of *high water*, unless he can go along the edge of the coast on the *terra firma*,² to

² Callis, p. 74, says, "I cannot more aptly compare a *bank* of the sea, or of a navigable river, than to a high way;" and he extends this right of way to a right "to tow the boats to and fro." But more recent authority has decided that "towage along the banks of navigable rivers is not a common right." *Ball v. Herbert*, 3 T. R. 253. This would not seem to be a

his boat? It would be a serious obstruction to the fishery if he must bring his boat where the old road runs into the sea, and no where else. So, when on the sea, if he desire to land his fish, his merchandise (not customable) or himself, at the time of high water, unless he is allowed a way along the *terra firma*, to the next public road, he cannot land at all; wherefore, in all such cases, at the time of high water, either there must be a Common law right of way, along the dry land to the nearest inland road, and consistent with the public right of fishing and navigation, or at the time of high water, no man can embark or disembark at other places than where the inland road meets the sea. Such a rule, in regard to the fishery, and to all the boat and small craft navigation, would be very injurious

"*necessarium usum*" for navigation, properly so called. But for every "*necessarium usum*," affecting the public fishery and navigation, the bank would seem to be open to the public. Whether the fishermen and others have a *right* to drag up their vessels above the reach of the tides, upon the banks, for security and for repairs, as is the universal *practice*, does not seem ever to have been decided; this would appear to be *essential* to the protection of the fishery, and perhaps be supported. See note to p. 208, ante. So the practice of drying nets on the adjacent land, as well as on the shore, does not

seem to have ever been sanctioned by a judicial decision, as a common right. Callis, however, states it as such, p. 73. It might be considered, perhaps, a practice of too vague a character to be supported as a general right, or even local easement, or liberty. In some places such a privilege might prevent the cultivation and usufruct of many acres of valuable ground. Nets are said often to extend more than a mile when spread out, belonging to one boat only. See what is said by Holroyd J. in *Blundell v. Caterall*, p. 295, 296, and cases cited there, which seem opposed to such privilege.

to the common right, and prejudicial to the public.

The law does not compel goods not customable to be landed at a port.

The Common law does not seem to control, in such manner, the general rights of fishing in and navigating the seas. It does not compel the subject to embark or disembark his person or his goods (not customable) at one place more than another; and it is conceived, that in order to the full, complete, and unimpeded exercise of these great public rights, a right of way, above and along the edge of high water mark, is involved in the existence of those other public rights, and annexed to them; but subject (for the due protection of *private* rights) to the control of a jury, as to what shall be deemed *sufficient*, in the place of exercise.

The object of these remarks has been to shew, that if a right of common, or to a liberty, or easement be established, the essential means of enjoying that right are established with it. If there be a customary right to bathe in the sea, the use of the sea shore, so far as such use is essential to the custom, must accompany it, but no further. The general doctrine of Bracton, that the sea shore is "common for use as the sea," is a legitimate argument in favour of the right of bathing, or any other common use of such shore, until it be shewn that such general doctrine is contradicted by law, or custom, or

both, as to that particular use of it; but no custom, no authority whatever has been adduced to *contradict* Bracton's general doctrine, so far as it is considered to include sea bathing.

If this usage of bathing be rejected as not founded in law, it must be rejected by arguments grounded on "the incompatibility with "private rights, or with public convenience" of the custom. The Court, indeed, in their decision, seem to have addressed themselves most particularly to the points of the inconsistency of *this* right with *other* rights, and its public inconvenience. Its incompatibility with other rights was strongly insisted upon by all three of the learned judges. It was said by Mr. Justice Holroyd, to be "inconsistent with the nature of permanent private property." By Mr. Justice Bayley it was asked, "If the soil be vested in "an individual, is he to be deprived of the "right of saying how that soil shall be used, "and the privilege of making any regulations he may think fit?" And by Lord Tenterden, "every public right to be exercised over the land of an individual is, *pro tanto*, a diminution of his private right:" and Mr. Justice Bayley and Lord Tenterden urged, that "it would prevent the owner of "the soil from building quays, wharfs, or "private houses, as well as from making "embankments, &c. ; for all such would be

As to the inconsistency of bathing with other private rights,

and with private appropriations of the shore.

“ obstructions to this public right of bathing,
 “ (if allowed,) and, therefore, abateable as
 “ nuisances.”³

As to its in-
 compatibility
 with private
 rights.

But it is to be remembered, that any such appropriations of the shore, even by the owner, are liable to be abated as nuisances, if they interfere with the public rights of *fish- ing* and of *navigation*. Whether they are or are not nuisances is a question for the jury. Thus then the private property of the shore, (such as it is,) is already, in two material instances, under the check of a jury, by which the owner is plainly interdicted from doing with the shore “ as he pleases ;” and why should it be thought *hard* to leave it to a jury to protect any other beneficial public custom;

³ This argument, as well as that used by the Court, p. 204, ante, rests upon the assumption that the sea-shores throughout the kingdom, are for the most part in the hands of private owners, and are *not* the property of the Crown. This, however, seems to be not only a gratuitous presumption, but a presumption against the King's title. The true presumption is, that the shores of the kingdom are the property of the Crown, and that individual subjects have no right, except by ancient grant from the Crown, to build houses, or construct wharfs, &c. on the shore. It is not to be *assumed* that the Crown has granted away *all*, or the *principal* part of

the shores of the kingdom. But if these private owner- ships are only *partial*, and not *general*, it does not seem a legitimate ground of argu- ment to object to a *general* custom, as such, *because* it might stand opposed, in a few places, to the *particular* ownerships of a *few* indi- viduals. The question ought to be considered as one be- tween the King's ownership in all the “ shores” of the realm, and the uses claimed therein by his subjects, in diminution of such absolute ownership. The custom of bathing on the shores of the realm has always been as fully acquiesced in by the Crown as the fishery, and from times as remote and immemorial.

(as bathing,) by determining whether the obstruction be or be not, in reason and common sense, a public nuisance? that is,—such an obstruction of the bathing as ought to be put down. Quays, wharfs, and embankments in general, *below* high water mark, convert that which was shore into *terra firma*, being, in fact, so much land gained from the sea, and therefore no longer shore. If any ground be left on the *other* side, towards the sea, that may be shore, and subject as before; but no one can suppose that an embankment by which the soil is rescued from the sea by the owner of the shore, would be abateable as a nuisance, in favour of bathing or fishing, whilst the shore, beyond and around, is still open to the public, and these rights may be enjoyed as easily as before. Nor was it ever contended that the supposed owner of the soil of the shore, has not a right to convert it into *terra firma*, at his own risk and expense, unless in so doing he created a public or local nuisance.

Quays,
wharfs, &c. on
the shore.

There is no law which makes a conversion of the sea shore into *terra firma*, *always* and *necessarily* a nuisance; it must be proved to be a nuisance in its consequences, and if it prove so to the public, it is better put down. If a road have been used, time out of mind, in a particular direction down to the sea, and by my in-taking of the shore I interpose dry land between the water and the place where the water before met the road, where is the

Bathing not
necessarily in-
consistent
with private
rights.

difficulty of prolonging the road down to the new-formed high water mark? A road existed heretofore over the shore to the sea, and is not lost by the shore's being now dry land; the said land when wholly dry is not altered in title, but is still subject to the right of road to the sea. Why, therefore, are not these rights reconcileable with each other? Suppose the sea to have suddenly retired from a tract of land, and the old road, instead of ending in the sea, to be thrown back a mile from the water, will not the law carry it on into the water? And why not also if the land become *terra firma* by the act of the party? If I have a way to the shore, am I, when arrived there, to ask leave of the Crown or other owner to walk, or ride, or drive into the water? In launching boats, and disembarking when the tide is low, it is frequently necessary to wade some distance through the water, and it is to be presumed that it is lawful so to do. When I have reached the shore, how can any line of road be prescribed to me which the next tide will not obliterate? The right of way on the shore is bounded by the water's edge, which is never stationary between high water and low water mark. But if that which was shore be made dry land, one road may then be set out for general use over it, in continuation of the road which before led to the shore, and so into the sea, or along the new shore. The right of bathing would seem to be nothing

more than a right of way down to the shore,
along the shore, and into the sea.

Every permanent occupation of the shore by exclusion of the sea, is an embankment or intaking; and every owner of the soil, whether the King or a subject, proving his ownership, has a right to appropriate such soil; but subject and without prejudice to existing rights of others. If the law of *Bagot v. Orr*⁴ be good, and a general Common law right of fishing on the shore at ebb tide exist, then *any* exclusive appropriation of the soil of the shore is in derogation of the public common right of piscary, and abateable as a nuisance, *if a jury shall decide it to be so* in the disputed place. So any appropriation or obstruction of the shore, or of the customary public approaches to the shore, injurious to the public right of navigation, is abateable as a nuisance.

The learned Judges, however, doubted whether, if they admitted the use of the shore for *bathing* to be a public liberty or privilege, all useful appropriations of the shore would be prevented. But if the appropriation in any given case would be a nuisance not to the bathing only, but to the fishery and navigation also, the sooner it is abated the better, whether the bather, or the fisherman, or the navigator, effect it; and if it be no

Right to bathe a right of way into the sea.

The right to bathe will not occasion other more beneficial uses to put down be as nuisances.

⁴ 2 Boss and Pul., 472.

obstruction, no nuisance, to navigation or fishing, but actually auxiliary and beneficial towards those national purposes, where is the probability that *such* an appropriation will, in its extent or locality, be adjudged a nuisance, by a jury, on behalf of the bather alone? On the other hand, if the appropriation prove of no advantage to fishing and navigation, whilst it materially interferes with the custom of bathing, a custom which may have become essential to the local interests of the place, the sooner such an appropriation is declared a nuisance the better.

National
advantages
resulting from
the present
custom of
bathing in the
sea.

The custom of bathing is not the less ancient or wholesome, because in the present age it has become a *fashion*; and it is now too late to deny that this fashionable custom, freely exercised, has caused a great resort of people to the sea-coasts, and has raised into existence many large and beautiful towns, and produced a spirit of industry and speculation, in furtherance of this bathing custom, which has added greatly to the wealth, population, and strength of the country. Millions of capital have been expended for the accommodation of those who frequent the shores of the Realm for the purpose of exercising their supposed right of bathing; and the fortunes of thousands are dependent on this "custom;" and yet, by the decision of the above case, it has been thought good to place all this great expenditure, and risk of industry and capital, at

the mercy of a private owner of the sea shore, out of regard to the barely possible case of a jury's interfering with the appropriation of such shore by the owner to the national purposes of fishing, navigation, and commerce, on the ground that it is *nevertheless* an obstruction to bathing. If the interests of these national purposes clash, it might be left to the Jury to decide which shall prevail.

It is said by Mr. Justice Holroyd, that, "where there is, or has hitherto been, a necessity, or even urgency, for such a right, there, as far as such necessity has existed, some usage must have prevailed." This admits that there possibly *may* be a *local* usage or custom of bathing. Now every manor on the coast has its inhabitants, and it were an assertion easily disproved were it said, that bathing in the sea is *not* customary with these inhabitants; and it would be impossible to arrive at the precise degree of necessity or urgency which introduced or continued the practice. Assuming that the inhabitants for the time being of the sea coasts of England, are and have ever been accustomed to frequent the shore for bathing, it would be singular to denominate this a collection of *local* customs. The inhabitants of the sea coast are, in fact, the only class of the community who *fish* in the sea, or on the sea shore, and yet it is not a *local* but a public and *general* common law right of

The custom of bathing in the sea too general to be construed a local custom.

fishing; and the custom of bathing is as general amongst the inhabitants of the sea coast as fishing. It would be strange, therefore, to denominate the one custom a *general*, and the other custom (which is at least equally general amongst the same class of persons) a *local* custom. But if the right to frequent the shore for bathing by means of *carriages* be denied, then, indeed, every Watering Place (as they are now called) in the Kingdom, may be wholly dependent upon the owner of the soil of the shore.

As to distinction taken by the court in *Blundell v. Catterall*, between bathing, and bathing in "machines."

Lord Tenterden observes, that the "machines are of comparatively modern invention."—It certainly is not handed down to us, by any records, by what various means our ancestors approached the sea for the purpose of bathing. But the question does not depend upon the inquiry, as to what "machines" they employed to transport themselves *to*, and *into* the sea;—but whether the sea-shore be, or be not, subject to a right of road or way for footmen, horses, and carriages to pass over and along it to the sea. Has not the subject a right of *carriage*, as well as *foot* way along the shore, to his fishing-boat, yacht, or trading vessel? And if he have, it would seem singular to deny his further right to drive or wade into the sea?

It is not meant to be said that a right of road will lay over a man's *stake-nets*, wears,

or private fishing-place ; *that* is a case *sui generis*, and an exception to the general rule ; but it is considered that no book, or authority, or custom whatsoever, denies the right of way, *ad libitum*, over and along the “ shore,” so long as it is *shore*, whether the soil be the King’s, or belong to a subject by grant from the Crown. Such right of way is allowed for fishing, and, when the case was *res integra*, it might have been expected that the Courts would have allowed the shore to be used as a highway as much for the one purpose as the other, instead of thus virtually declaring the same man a trespasser for bathing, who was no trespasser when up to his knees or neck in water, in search of a lobster, a crab, or a shrimp.

The right of way general over the shore, on foot and in carriages.

It was further said, by the Court, that in the exercise of this right, (if allowed,) “ one man might make his own special profit of conveying persons over the shore, the soil of another ; and that such man had no reason to complain if the owner of the soil shall participate in the profit.”⁵ But the profit made by the bathing assistant is upon the use of the “ machine,” and the labour of his

As to the profits arising to the persons who assist those who bathe, and the inconsistency of such profits with the rights of private owners.

⁵ This, also, seems to be an objection raised to a general custom, upon the ground of its interference with some *few partial* ownerships. But the ownership to which this general custom stands properly opposed, is the general ownership of the Crown in the sea-shores of

the realm, and not to the ownerships of a few scattered individuals. It is not to be assumed, nor is it presumed by the law, that the subject has any right to the soil of the shore at all ; and if no such presumption can be made, no argument can be founded on it.

Objections to right of Bathing considered.

driving it, and his attendance, and it might as well be urged that if I am driven in a hired carriage across the soil of the lord of an inland manor, along a public parish road, the lord can, reasonably, stop the driver, and insist upon "participating in his profit" or hire. According to this view of the case, the ownership of the sea-shore may, by a rapacious individual, be made, in many places of public resort, a most lucrative source of exaction.

As to the supposed advantage of subjecting bathing to the regulation of the owners of the shore.

The Court, moreover, decided against the liberty of bathing, not only from the silence of the books, and its supposed "inconsistency with certain private rights," but were also of opinion, that "in sea-bathing, as it now prevails, particular regulations are desirable; and yet the existence of this common law right would be a great obstruction to any such regulation." But it can scarcely be deemed a public benefit to subject this right of bathing to the superintendence of the owner of the soil of the sea-shore, (i. e.) the lord of the manor, or his grantee, who may be a hundred miles off; and who is under no obligation, by law, to concern himself about it at all. It is to be remembered too, that so far as *decency* is concerned, the public are perfectly able to protect themselves; for the *indecent* of bathing in too public places, and in too exposed a manner, is indictable as an offence, and punishable at common law, by

the local magistrates, without paying any tax to the lords of the sea-shore. The idea of denying this ancient, universal, and healthful custom the support of the Courts of Law, *with a view* that the lord of the manor may superintend the bathing, (not without charging his own price for it,) or in order that “some “contests” between the bathing men and women may be prevented thereby, seems singular. It is not probable that the owner of the soil will ever interfere in these matters, unless for the purpose of making a profit thereby. The public are not likely to be the gainers by his services, especially if they may be taxed for the use of the shore, at the will of the owner. The decision in the case of *Blundell v. Catterall* has, however, put it in the power of every owner of the soil of the sea-shore to levy a tax, *ad libitum*, upon the bathers, not only at fashionable watering-places, but throughout the coasts of England, *wherever such ownership of the shore can be proved*. If the public are laid open to such a tax, they will do well to try with a closer scrutiny the claims set up by lords of manors to the “sea-shore;” and not to take it for granted that, because A or B is lord of the manor *on the coast*, that he is *therefore* owner of the *shore*, now that such ownership involves a question most important to the property of thousands, the prosperity of numerous towns and districts on the coast, and the general health, convenience, and enjoyment of the public.

*As to the public Right to dig for Sand,
Shells, &c. on the Shore.*

Case of Bagott v. Orr, considered.

1. As to the public right to catch shell-fish on the shore.

2. As to the public right to dig for and use shells, sand, &c. on the shore.

Case stated.

The case of Bagott v. Orr, 2 Bos. and Pull. 472, turned upon two points; 1st, whether the subjects of the realm had a general common law right to catch and take *shell-fish* on the sea-shore, *between the flux and reflux of the tides*? 2dly, Whether the subjects of the realm had a general common law right of digging, collecting, and carrying away for use sea *shells*, and, by consequence, any other portion of the *soil* of the sea-shore? It was an action of trespass, brought by Bagott against the defendant Orr. The first count was, the breaking and entering the plaintiff's closes, called &c. [names] *and the sea-shore* in the parish of Keysham, and plaintiff's *shell-fish* and *shells* there finding, catching, taking and carrying away, and converting and disposing thereof to defendant's own use. The second count was for breaking and entering the same closes, and with defendant's feet, and the feet of his servants, in walking, treading up, trampling upon, subverting and spoiling plaintiff's soil, earth, and sand, and with the feet of cattle, and with the wheels of carriages, and the keels of boats treading up, trampling, &c.; and the plaintiff's *shell-fish* and *shells* breaking, crushing, and destroying, and with spades, &c. digging, and making holes, pits, and turning up, &c. plaintiff's earth, soil, and sand, and digging up, raising up, and

getting up divers large quantities of plaintiff's *shell-fish* and *shells*, and carrying away the same, and converting and disposing thereof to defendant's own use. There were several other counts for breaking and entering plaintiff's *several fishery*, and his *free-fishery*; on which issues in fact were joined. The defendant pleaded, 1st, the general issue. 2dly, as to the trespasses mentioned in the two first counts, that the closes therein severally mentioned were the same, and that the said closes in which, &c. at the said several times when, &c. were and still are, and from time immemorial have been, *parcel of a certain arm of the sea*, in which every subject of this realm, at the said several times when, &c. of right had, and of right ought to have had, and now hath, and of right ought to have, the liberty and privilege of *fishing*, and catching, digging for, raising, getting, taking, and carrying away *shell-fish* and *shells* there, and therefore, defendant being a subject of this realm, at the said several times when, &c. entered into the said closes in which, &c. so being part and parcel of the said arm of the sea, to fish therein, and to catch, dig for, raise, get, take and carry away the *shell-fish* and *shells* there, and did then and there fish, and caught, took, and carried away the said *shell-fish* and *shells* in the second count lastly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the said *shell-fish*,

he entered the said closes in which, &c. by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and with the said boats, lighters, and other vessels, the same being reasonable, and proper, and necessary in that behalf, and in so doing, he necessarily, and unavoidably, with his feet, &c. in walking, a little trod up, &c. the earth and sand in the second count mentioned, and with the feet of the said cattle, &c. a little trod up, &c. other the soil of plaintiff's last-mentioned closes, and the said *shell-fish* and *shells*, in the second count first mentioned, necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, &c. the same being useful, proper, and necessary in that behalf; and in digging up, raising, and getting the said *shell-fish* and *shells*, in the second count lastly mentioned, necessarily and unavoidably made the said holes, and pits, in plaintiff's said closes, and necessarily and unavoidably with the spades, &c. dug up, &c. a little of the earth, soil, and sand, in the said closes, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. and this, &c. whereof, &c. Upon this the plaintiff new assigned, alleging that defendant, on the days in the first count mentioned, broke and entered plaintiff's closes in the first count mentioned, "being certain closes lying *between the flux and reflux of the tides of*

“ *the sea*, in plaintiff’s manor of Keysham,⁶
 “ and the said *shell-fish* and *shells* there
 “ found, caught, took, and carried away, and
 “ converted and disposed thereof when the
 “ same closes in which, &c. were left dry, and
 “ not covered with water.” And also that
 defendant, on the days and in the manner in
 the second count mentioned, broke and en-
 tered into plaintiff’s closes, being certain closes
 lying between the flux and reflux of the tides
 of the sea, within plaintiff’s said manor of
 Keysham, and with his feet, &c. trod up, &c.
 the earth, soil, and sand, in the second count
 mentioned, and with the feet of the said cattle,
 &c. trod up the said other soil in plaintiff’s last-
 mentioned closes, in the said second count
 mentioned, and plaintiff’s said other *shell-fish*
 and *shells*, in the second count mentioned,
 broke, crushed, &c. and with spades, &c. dug
 and made holes, &c. and raised up, and got up
 the said *shell-fish* and *shells*, &c. and took and
 carried away the same, and converted and
 disposed thereof, &c. when the said last-men-
 tioned closes in which, &c. were left dry, and
 were not covered with water, as plaintiff in
 the first and second counts of the said decla-
 ration complained against him, which several
 trespasses so above new assigned are other
 and different trespasses, &c. wherefore, &c.
 To the new assignment the defendant pleaded,
 first, the general issue; secondly, that the

⁶ Thereby *claiming* the shore as parcel of the manor; but whether this claim was well founded. or not, was not in evidence, nor disputed.

said closes, first abvoe newly assigned, and the several closes secondly above newly assigned are, and at the several times, &c. were the same closes, and not other or different closes, and are, and at those times when, &c. *were certain rocks and sands of the sea*; lying within the *flux and reflux* of the tides of the sea; and that the said *shell-fish* and *shells* in the said closes, &c. were certain *shell-fish* and *fish-shells* which, at the said several times when, &c. were in and upon the said rocks and sands of the sea, and which but a little before the said times when, &c. were, by the ebbing of the tides of the sea, left there in and upon the said closes in which, &c. and that in the said closes in the said declaration mentioned, *every subject of this realm*, at the said several times when, &c. of right had, and of right ought, &c. the liberty and privilege of getting, taking, and carrying away the *shell-fish* and *fish-shells* left by the said ebbing of the tides of the sea, in and upon the said closes in which, &c. wherefore the defendant, being a subject of this realm, at the said several times when, &c. entered into the said closes in which, &c. to get, take, and carry away the *shell-fish* and *fish-shells* left by the ebbing of the tides of the sea, in and upon the said closes in which, &c. and then and there got, took, and carried away, the said *shell-fish* and *shells*, in the said first count mentioned, and also got, and for that purpose, with spades, &c. necessarily dug up and

raised up, and took and carried away, the other *shell-fish* and *shells* in the second count lastly mentioned, and for the getting, taking and carrying away of the said *shell-fish* and *shells*, the defendant, at the said times when, &c. entered the said closes in which, &c. as it was lawful for him to do, by himself and with other persons, and with the said cattle, carts, &c. and the said boats, &c. the same being reasonable and proper and necessary in that behalf, and in so doing he necessarily and unavoidably, &c. broke, crushed, and destroyed, and with the said spades, &c. dug up, &c. a little of the said earth, soil, and sand, in the said closes, as it was lawful for him to do, for the causes aforesaid, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. and this, &c. wherefore, &c. To this plea there was a replication traversing the right of every subject to take *shell-fish* and *shells*, and a special demurrer thereto, because it traversed matter of law; but the Court seeming to think that the replication was clearly bad, it was abandoned by the plaintiff's counsel, who relied upon objections to the plea.

It appears that the plaintiff asserted the said closes "were lying *within the flux and reflux* "of the sea, *WITHIN* the plaintiff's manor;" and his *ownership* of these closes, (being part of the sea-shore) *was not disputed*. In virtue of this ownership, he (Bagott) denied the right

Remarks upon the case of Baggot v. Orr.

Judgment of
the Court.

of the defendant (Orr) to catch *shell-fish*, and also his right to carry away for use sea *shells*.

The Report says, "the Court were of opinion that, if the plaintiff had it in his power to abridge the common law right of the subject to the *shell-fish*, he should have replied that matter specially; and that not having done so, the defendant must succeed upon his plea, as far as related to the taking of the *fish*; but observed that, as no authority had been cited to support his claim to take *shells*, they should *pause* before they established a general right of that kind."

It is to be regretted that a fuller report of the judgment in this case has not been given (if more was said); but it seems to be understood, that the Court affirmed the general common law right of the subject to take or catch "*shell-fish*," but doubted whether any such general common law right existed for the subject to take *shells*; meaning, it is presumed, shells of fish destroyed by natural causes before capture, and not the shells of the shell-fish caught by the fishermen, otherwise the decision would have much of the character and effect of that recorded in the Merchant of Venice.

The catching
and taking
shell-fish on
the shore is of
common right.

With regard to the catching of *shell-fish* on the sea-shore, it would seem to constitute an integral part of the public *common of piscary*, and to be subject only to the same occasional exclusion, by a prescriptive *several* fishery,

as the public fishery in the sea itself, and creeks and arms thereof, or tide-rivers, is in some places liable to. The fishery for lobsters, crabs, prawns, shrimps, oysters, and various other shell-fish, besides certain other kinds of fish, such as eels, &c. is carried on in every fishing village on the coast, and is one very useful and valuable branch of the fishing trade. The catch of these fish is, therefore, part of the public common of piscary, however the fisheries may be regulated (as many are) by act of parliament. Acts of parliament for the regulation of the fisheries are very numerous, and would form a large volume in themselves; and they regulate, in many instances, private as well as public fisheries. But such acts of regulation do not concern the ownership of the soil. The *oyster* fisheries are especially subject to the most jealous enactments, and many of them belong to private owners, or to corporations. But whether to one individual, or to a corporate body, it would seem that the title to such exclusive privilege must be supported, as against the *prima facie* public right, by the same kind of evidence as already mentioned in regard to a private fishery in the sea and tide rivers, viz.—grant from the Crown, or prescription. There is no distinction, (in regard to the nature of evidence required to substantiate the right of a corporation,) between a *separate fishery* claimed by a corporate body, or by one individual. The same remark applies to the owner-

ship of the *soil* itself of the sea-shore in corporate bodies, or in individuals. It has already been contended, that the ownership of the soil of the shore does not necessarily confer a right to a several fishery, nor a right to a several fishery necessarily confer the ownership of the shore. Although, in regard to the latter, the cases incline to annex the soil to the ownership of a several fishery. But the *onus* of proof lies upon the individual, or corporate body, who would claim the exclusive right of fishery against the *general* Common law right of all the King's subjects to catch shell and other fish upon the sea-shore, as well as in the sea itself.

Now, if this be good law, and the King's subjects have a general Common law right of frequenting the shore (whether belonging to a lord of a manor or not, and so that there be no prescriptive several fishery) "on foot and "with cattle, carts, and carriages," for the purpose of catching these kinds of fish, there can be no doubt that the shore is a highway for fishing at least, as public as the sea itself. No part of the shore, from the extremest lines of the flood and ebb tides, can be free from public use and resort for the fishery. The shore is, in this sense, part and parcel of the sea, and although an ownership is more frequently claimed in the shore by grant from the King, than in the sea itself; yet, as it was in the Crown as part of the sea, so it is

granted to the subject as part of the sea, and therefore liable to the public common of piscary.

With regard to the question of right to dig for shells, &c., a technical distinction is to be noted between a mere right of egress and regress, or *way*, and a right to dig and take away the soil. The first is, in law, a mere *liberty*, or *easement*; but the carrying away the soil is called a *profit-a-prendre*, being the conversion of the soil into profit; the one takes more of the substance from the owner of soil than the other, and diminishes the value of the ownership of the soil in proportion. Blackstone, J., in his Commentaries,⁷ after stating that "common" is "a profit which one man hath in the land of another," and after describing the commons of pasture, piscary, and turbary, adds, "there is also a common of digging for coals, minerals, stones, and the like, all these bear a resemblance to common of pasture in many respects; though in one point they go much farther—common of pasture being only a right of feeding on the *herbage* and *vesture* of the soil, which renews annually; but common of turbary, and those aforementioned are a right of carrying away the *very soil* itself." Nevertheless, a right to pasture cattle on the Lord's common waste, and a right to dig turves or marl, are both *technically* the same, viz. *profits-a-prendre*; but a

As to the public right to dig for shells, sand, &c. on the shore.

Distinction between easements, and profits-a-prendre.

⁷ Vol. ii. p. 34.

right of *way* over the soil is a mere *liberty* or *easement*. It is clear, however, that the subjects of the realm may enjoy a *profit-a-prendre* by general right, as well as an easement, because the public right of fishing is a *profit-a-prendre*.

As to taking
profits *a-prendre*
in the
wastes of in-
land manors.

Now as the treatise ascribed to Lord Hale has compared the "great waste" of the sea (of which the shore is part) to the waste lands of a manor, it will be well to explain the point in question by shewing, that the wastes of a manor may be, and often are, subject to rights similar to that of digging and carrying away the materials of the "sea-shore;" and then to inquire how such right ought to be supported (if the point be not yet settled *contra*) in regard to the sea-shore, as well as inland manorial wastes. It must be remembered, however, that manorial customs are *local*, and not *general* rights. Thus a copyhold tenant of an inland manor may dig for marl for manure, and for turf for fuel.⁸ So he may dig for gravel and sand,⁹ and notwithstanding these acts of the copyholder, the soil and freehold of the waste is in the lord of the manor. But these are local customs of the manor, and in some manors do not at all exist.

⁸ Gilb. Ten. 327. 2 Atk. 189. Shakspear v. Peppin, 6 T. R. 741.

⁹ Duberly v. Page, 2 T. R.

The cases referred to in favour of taking sand and stones, &c. in an inland waste of a manor, which were expressly stated to be for building and repairs, and the case of taking marl for manure, are perfectly analogous to the uses to which the soil of the sea-shore is most capable of being applied, and which, together with the fishing and navigation, constitute its essential value. Since, then, the custom or usage to dig and carry away for use the materials of the soil of another in *inland* titles is (as a local custom) well known and admitted, the question remains, whether a custom to dig shells, or sand, or stones, &c. on the sea-shore, which shore is either owned by the King, or by the lord of the manor adjacent, can be claimed and maintained as a *local* custom? or, if not, then whether as a *general* custom for all the subjects of the realm?

They are analogous to digging for shells, &c. on the shore.

First, can it be claimed as a *local* custom or usage? for, if it can, *that* will be inconsistent with a *general* custom. As a local custom it must be claimed by the parties, either as *tenants* of the adjacent manor, under the manorial custom, and as if the *shore* were part and parcel of the *wastes* of the manor, and therefore within the manor; or it must be claimed by them as "*inhabitants*" of the adjacent hamlet, town, parish, hundred, or county. If it be claimed in right of the manorial customs, the "sea-shore" of the *locus*

As to the right of taking shells, &c. on the shore by local custom.

in quo must be admitted or proved to be part and parcel of the waste lands of the manor. As waste of the manor, the shore, it is conceived, *may* be subject to such commons as waste lands in inland manors are usually subject to; and all that will be necessary in such case will be, to prove the usage or right of *common aprendre* by the usual evidence resorted to in the case of similar claims in inland manors. But if, from circumstances, the claimant cannot support such right by the custom of the manor, either because he is no tenant, or because the shore does not appear to be within the manor, in such case he must support his right as an "inhabitant" of the adjacent hamlet, vill, parish, hundred, or county, which is also a *local* claim; or, lastly, as a subject of the realm, which is a public and *general* claim. Neither the local claim, as "inhabitants of the adjacent hamlet," &c., nor the general right make it *necessary* that the "shore" should be *extra manerium*. Whether it be or be not within the manor, it *may* yet be subject either to a *local* or to a *general* right.

Distinction
between pre-
scription in
the *que* estate,
and as an
"inhabitant."

There is, however, a distinction taken at law, between "inhabitants" of a particular place or district, and "owners" of estates or tenements in such place or district, as to making title by prescription to these kind of customs. In the *latter* case, the custom is, as it were, attached to the *estate*, and the

owner claims in respect of his estate; but in the *other* case it is merely *personal*, claimed in a personal character, as an "inhabitant." Lord Coke¹ lays it down, that a custom, such as gavel-kind or borough-english, cannot be alleged in an upland town,² but such town may allege a custom to have a way, or to well order commons, &c. "But," he adds, "in special cases, a custom may be alleged within a hamlet, or town, or burgh, or city, manor, an honor, an hundred, and a county." It is said, in Vin. Abr. tit. "prescription,"³ that "inhabitants, *unless incorporated*, cannot prescribe to have any *profit* in the soil of another; but in matters of *easement* only, as in a *way*, &c., but not in matters of interest." Cro. Jac. 152, and Gateward's case⁴ are cited.

This latter case is a leading case on the subject of pleading, alleging, or prescribing for customs. The point in the case was a common of pasture, claimed by the defendant in a close of land belonging to the plaintiff, as a customary right enjoyed time out of mind by the *inhabitants* dwelling and residing in an ancient messuage, in the ancient town of Stixwold, adjoining to the close. "It was resolved, that the custom was against law, for several reasons. 1. There are but four man-

Gateward's case.
Prescription for a profit a-prendre by "inhabitants," not good.

¹ 1 Inst. 113, b.

² i. e. A town not having the privileges of a borough or corporation.

³ Vin. Abr. tit. Prescription a.

⁴ 6 Rep. 59.

Gateward's
case.

ner of commons, i. e. common appendant, appurtenant, in gross, and by reason of vicinage: and this common, *ratione commorante*, and resident, is none of them; and *argumentum a divisione est fortissimum in jure*. 2. What estate shall he who is "inhabitant" have in the common, when it appears he hath no estate or interest in the house, (but a mere habitation and dwelling,) in respect of which he ought to have his common? for none can have interest in a common, in respect of a house in which he hath no interest. 3. Such custom will be transitory, and altogether uncertain; for it will follow the person, and for no certain time or estate, but during his *inhabitancy*, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. 4. It will be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person, that no person certain can extinguish it, but as soon as he who releases, &c. removes, the new inhabitant shall have it. 5. If the law should allow such common, the law would give an action or remedy for it; but he who claims as an "inhabitant" can have no action for it. 6. In these words "inhabitants" and "residents" are included tenant in fee simple, tenant for life, for years, tenant by elegit, &c., tenant at will, &c., and he who hath no interest but only his habitation and dwelling;

and by the rule of all our books, without ques-
tion, tenant in fee-simple ought to prescribe By whom a
profit-a-pren-
dre may be
prescribed
for.
in his own name, tenant for life, years, by
elegit, &c., and at will, &c., in the name of
him who hath the fee; and as he who hath no
interest can have no common, so none that
hath no interest, if he be but at will, ought to
have common, but by good pleading he may
enjoy it. 7. No improvements can be made
in any wastes, if such common [custom]
should be allowed; for the tenants for life,
for years, at will, tenant by elegit, statute
staple, and statute merchant of houses of
the lord himself, would have common in the
wastes of the lord himself, if such prescrip-
tion should be allowed, which would be incon-
venient. But two differences were taken and
agreed by the whole Court. 1. Between a
charge in the soil of another, and a discharge
in his own soil. 2. Between an *interest* or
profit to be taken or had in another soil, and
an *easement* in another's soil; and, there-
fore, a custom that every inhabitant of a town
hath paid a *modus decimandi* to the parson in
discharge of their tithes, is good; for they
claim not a charge or *profit-a-prendre* in the
soil of another, but a discharge in their own
land. So of a custom, that every inhabitant
of such a town shall have a *way* over such
land, either to the church or market, &c., *that*
is good, for it is but an easement, and no profit;
and a way or passage may well follow the

But "inhabit-
ants" may
prescribe for
easements.

Gateward's
case.

person, and no such inconvenience as in the case at bar. 8. It was resolved, that copyholders in fee, or for life, may, by custom of the manor, have common in the demesnes [wastes] of the lord of the manor, but then they ought to allege the custom of the manor to be "*quod quilibet tenens custumarius cujuslibet antequi messuagii customar,*" &c., and not "*quod quilibet inhabitans infra aliquod antiquum messuagium customar,*" &c. For a copyholder hath a customary interest in the house, &c., and therefore he may have a customary common in the lord's wastes; and in such case he cannot prescribe in the name of the lord, for the lord cannot claim common in his own soil, and, therefore, of necessity such custom ought to be alleged. Vide 21 E. 3. 34, Foiston's case, 4 Rep. 31, 32. Another difference was taken and agreed, between a *prescription*, which is always alleged in the *person*, and a *custom*, which always ought to be alleged in the land; for every prescription ought to have, by common intendment, a lawful beginning, but otherwise it is of a custom, for that ought to be reasonable, and *ex certa causa rationabili* (as Littleton saith) *usitata*, but need not be intended to have a lawful beginning, as custom to have land devisable, or of the nature of gavel-kind, or borough-english, &c. These, and the like customs, are reasonable, but by common intendment they cannot have a lawful beginning

by no grant, or act, or agreement, but only by Parliament. See also, for this matter, Foiston's case. Also, it was agreed, that the custom of a manor that *dominus pro tempore* ^{Gateward's case.} shall grant lands customary, is good, and tenant at will may do it; and so 20 H. 6, 8, b. by the custom of the Court of Common Pleas, the Chief Justice grants divers offices for life, and these customs are good; but, in such cases, he who grants them hath an interest in the manor or office, and their grant is made good by the custom; and 19 R. 2, action sur ie case, 52, a. beadle of the hundred shall have three flaggons of beer of every brewer who sells within the hundred, *causa qua supra*. But a custom, that an *inhabitant* or "resident" shall grant or take any profit, is merely void. 9. It was resolved, that if the custom had been alleged, that *quilibet paterfamilie infra aliquod antiquum messuag'*, &c., it would also be insufficient for the causes and reasons aforesaid; and if he hath any interest he may be relieved as aforesaid. Vide reported by Spelman that such custom is not warranted by law, and so it was adjudged in this Court. Trin. 33 Eliz. Rot. 422. See the Book of Entries, Trespass, Common, 6. Vide 9 H. 6. 62 b. 7 E. 6. Dyer, 70. Isam's case."

The case of Grimstead v. Marlowe,⁵ follows ^{Grimstead v. Marlowe.} Gateward's case; and it is there laid down by

⁵ 4 T. R. 717.

Lord Kenyon, that a man must prescribe in a *que estate* for a *profit-a-prendre*, which a mere "inhabitant" or "resident" cannot do; and it seems settled, that where an *inhabitant of a town* would claim a *profit-a-prendre*, he must prescribe that "he and all those whose *estate* he hath in his house have used to "have common," &c., as in *Miller v. Spate-man*, 1 Saund., 339, 343.

Grimstead v. Marlowe.

Mere "habitan-
tancy" not
sufficient to
support a plea
for a *profit-a-
prendre*.

The case of *Grimstead v. Marlowe*^a was a right of common of pasture, claimed by an inhabitant of the parish of Leatherhead. It was pleaded in virtue of a custom, "that every "inhabitant" occupying, residing, and dwell-
ing in any ancient messuage or tenement
within the parish of Leatherhead, for the
time being, &c., had been used and accus-
tomed," &c. But the Court held that such
plea was bad, because it was a *profit-a-pren-
dre*, which could not be pleaded but in a *que
estate*: here the plea was mere *habitan-
tancy*, or
occupancy, not ownership; but the Court did
not object to its being prescribed for by the
party, "that he and all those whose estate he
hath, &c. in his house" had enjoyed such
profit-a-prendre, and gave him leave to amend
accordingly. Here it is to be observed, that
no distinction was taken that he could not (if
he would) prescribe in a *que estate* in a parish

^a See also *Weekly v. Wildman*, 1 Ld. Raym. 405, and
Silby v. Robinson, 2 T. R. 758.

or town, in contra-distinction to a borough, or city, or county, inasmuch as the prescription, in such case, would be in respect of the *estate* he had in his tenement, and not in respect of its being in this or that place. It was immaterial where the *que estate* was situated, provided he could establish his prescription by the usual proofs, "that he and all those who " owned, or had owned before him that *estate*, " had been used to have the *profit-a-prendre* " in question."

It would seem, therefore, that every one who would claim a *local* custom or usage to dig marl, or sand, &c. in *inland* manors, must (on account of its being a *profit-a-prendre*) plead in the *que estate*, i. e. in respect of his interest in the tenement which he holds; which prescription, however, must be laid in the person of him who is *seized in fee-simple*, and not in the person of one who holds any lesser interest; who is not, in the eye of the law, owner of the estate. But tenant for life, for years, or at will, may prescribe in the name of the tenant in fee-simple. A copyholder is allowed to prescribe in his *own* estate for the reason given in Gateward's case. Thus far, however, seems clear, that by due form of pleading, in respect of his ancient tenement situate within a town, and by consequence, in other *loci* known to the law, as honors, manors, (parishes) hundreds, boroughs, and counties,

How the custom to dig shells, &c. must be prescribed for as a local custom.

all these persons before named may, by good evidence of immemorial usage, substantiate such *profits-a-prendre* as before mentioned.

Such being the law in regard to *profits-a-prendre* in *inland* titles, there would seem to be no objection in law to prevent the owners, or their lessees, of any ancient tenement in any such district or place before named, *situate on the coast*, (as the defendant Orr in the case in question) from pleading in the *que estate*, and prescribing for a customary right or usage of taking shells, sand, or other portions of the soil of the *shore*, and if supported by the usual evidence, making good such local usage. There would seem to be no *technical* reason why this might not be done, in respect of the "great waste" of the sea-shore, where the party has an ancient tenement on the coast, as well as in respect of inland wastes.

Whether, as a local custom, the digging of shells, &c. can be prescribed for by "inhabitants,"
Quære?

Whether the Courts would permit any such customary profit, derivable from the *sea-shore*, to be pleaded as a *local* custom, *without* the *que estate*, i. e. as "easements" are pleaded, does not seem to have been ever mooted. The reasons given in Gateward's case would seem to preclude any such proposition; at least where the "shore" is part of the manor, and in the lord's ownership. Where the shore is not within the manor it is the property of the Crown; and whether, as such, it will admit

of a different form of laying the local custom, or profit in question, viz., in the *person* as “inhabitant” does not appear. It is concluded that it will not; but it is remarkable, that the men of Devon and Cornwall have immemorially enjoyed the custom of taking the *soil* of the shores of those counties for use, either in the character of “*dwellers*” and “*inhabitants*” *locally*, or else by the *general* Common law right, and not in the *que estate*. For this appears from the preamble of the statute, 7 Jac. 1, ch. 18, reciting that “whereas the sea-
“*sand*, by long trial and experience, hath been
“found to be very profitable for the bettering
“of land; and especially for the increase of corn
“and tillage within the counties of Devon and
“Cornwall, where the most part of the *inhabi-*
“*tants* have not used any other worth for the
“bettering of their arable grounds and pas-
“tures; notwithstanding, divers having lands
“adjoining to the sea-coasts there, have of
“late interrupted the *bargemen* and such
“others *as have used of their free wills and*
“*pleasures* to fetch the said sea-sand, to take
“the same *under the full sea-mark*, as they
“have *heretofore* used to do;”—the statute then goes on to confirm the right of “all per-
“sons whatsoever *resiant* and *dwelling* within
“the said counties of Devon and Cornwall, to
“fetch and take sea-sand at all places under
“the full sea-mark,” &c.⁷

Statute of 7
Jac. 1., ch. 18,
declaring the
right in the
“inhabitants”
of Devon and
Cornwall,
to take sand
on the shore.

⁷ See the statute fully cited p. 102 ante.

Remarks on
the statute.

Now this statute, it is to be observed, asserts a pre-existing custom, commonly used by the *inhabitants*, at their free wills and pleasures, to take a *profit-a-prendre* upon the shores of the counties of Devon and Cornwall. But if they were entitled to such custom, as a local custom, *prior* to the statute, it must have been by "prescription," and a prescription *not* founded on the "*que estate*," but enjoyed as "inhabitants;" and if the "inhabitants" of the counties of Devon and Cornwall could have so claimed, at law, the profits in question, then the "inhabitants" of other counties, or districts, might set up a custom, *so pleaded*, to enjoy the like profit. It may be, and probably is the fact, that the inhabitants of other maritime counties have been used to take sand, shells, &c. for similar, or equally useful purposes as those referred to in the statute of James; and yet it is evident, that unless the rule be relaxed so as to permit them to prescribe otherwise than in the *que estate*, they, the inhabitants of other counties, cannot maintain such custom, as a local custom, except by similar aid of Statute law, or as a general right, however it may have been heretofore acquiesced in by the King, or mesne lord of the soil, and is further recommended by its public utility. It is also manifest, that if those persons only who possess "ancient tenements" can maintain such right by pleading in the *que estate*, it will be confined to a comparatively

limited number of persons, and very different from that enjoyed by the men of Devon and Cornwall. It must be allowed, however, that regarding Gateward's case as good law, it would seem to compel the Courts to put the claim to dig and use the soil, &c. of the sea-shore, (if pleaded as a *local* custom) upon the same footing as an inland claim to dig, &c. in the waste of a manor, and to confine the right in question to those persons only who can plead in the *que estate*, i. e. who are owners of an ancient tenement on the coast.

With regard to the custom as a *general* Whether the custom to dig for shells, &c. on the shore is of common right. *right* in all the subjects of the realm, as pleaded in the principal case, it is obvious that if the Courts could support the right upon the same footing as the public right to fish, no technical difficulties would arise as to the pleading. The defendant Orr, in the case referred to, seems to have felt the difficulty of pleading a local custom for a *profit-a-prendre* as an "inhabitant," and therefore grounded his case on the general right. As the Court *hesitated* before it decided on the general right, and did not use any very decisive language against it, there may perhaps be room for a further discussion of the question. The point, as regards the "sea-shore," and the public right so to use it, was *quæstio nova* in Bagott v. Orr.

It certainly is not necessary to plead a *general* The custom or practice is general through- custom in the *que estate*, whether such

out the mari-
time counties.

custom be a *profit-a-prendre* or not. Looking at the general claim as *res integra*, it must be admitted that there is reason to presume that the "inhabitants" of all the districts bordering on the sea-coasts of England, have *actually* (whether now allowed to be *lawfully* or not) been in the *habit* of resorting to the "shore" for the materials in question, for manure and other useful purposes, without asking the consent of the owner of the adjacent *terra firma*; and it would be difficult to find a cultivated and inhabited spot, on or within reasonable distance from the coast, where it has not been the practice of the inhabitants to resort to the shore for materials for manure, for ballast, for building, road mending, &c. It is the natural, if not the necessary result of their locality and wants.⁷ It is not to be looked at as a want confined to those persons only who are *immediately* dwelling on the sea-side, but may be reasonably extended to all within convenient reach of it; to all such in fact as have, by a like immemorial usage, established a general right to fish. It may also be remarked, that where such general inducement exists every where along the coasts of England to use such materials, and yet no case is to be found *supporting* the practice as a local and limited custom, or *denying* it as a general right,

⁷ Lord Hale mentions "ballastage" or a toll "for liberty to take up ballast out of the bottom of the port," as a *port duty*,

arising "from the propriety of the soil," de Portibus maris, 74. Qy. As to any toll of the kind out of ports?

(if we except *Bagott v. Orr*) the presumption is in favour of it as a general custom.

In the case of *Bagott v. Orr*, after quoting the statute of James I., before noticed, the learned Counsel in favour of the right contended, that “the statute was, in fact, a full recognition of the right of the subject to use the shore of the sea in every way in which it could be serviceable to him.” On the other side it was contended, that “it was an enacting, and not a declaratory law; and that a peculiar privilege is thereby granted to the men of Devon and Cornwall, which peculiar privilege it would have been absurd to have granted, if *all* the people of England had been entitled thereto at Common law.”

Whether the statute of 7 James I., ch. 18, be declaratory of the common right or not.

The Court offered no argument upon this statute, or upon the reasoning on either side. Now, it may perhaps be insisted in favour of the public, that the statute is both a declaratory and an affirmative statute. It states a long existing usage, without throwing a doubt upon its legality, and affirms that such use shall be continued. It forbids the owner of the soil “adjoining the *coast*” to molest those who frequented the *shore* for the purposes of digging sand, &c. but allows such owners to take a reasonable toll, or composition, for the damage done, *not* to the *shore*, but to their “adjoining grounds,” and for casting sand there, and for way, passage, &c. in places where no general right of way existed to the shore. The

toll was not for *digging* and *appropriating* sand, &c. *under the full sea-mark*.

There is not a word in the statute intimating a right in the owner of the land adjoining to a property in the sand, &c. itself, *under full sea-mark*. The words are, “paying for the taking, “casting out, and landing of every barge “load of sand *upon the grounds of any man*, “such duties, &c., and for passage by and “through such ways, &c., such duties, &c. “as had been used and accustomed.”⁸ There may have been abundance of the same materials worth taking *above* high water mark, and the soil above high water mark belonged to the adjoining land. The owners of the adjoining grounds, above the full sea-mark, appear to have also refused to permit sand to be heaped upon or carried over their land, which the statute, for the public good, compels them to allow; but this does not show or prove a right in such persons to the *shore*, under the full sea-mark. The first section of the statute seems to be *declaratory* of the custom of the counties, viz. to dig and fetch away sand under full sea-mark. The second section is

⁸ Payments to the owner of the adjacent ground or bank, immediately above high water mark, for *depositing* timber, stone, &c. there, are very common. But this is not for the *landing* the goods,—but for the use of the ground so appropri-

ated. According to Lord Hale, de Portibus maris, 51, it was resolved, in a case he cites, that “though a man “may take amends for the “*trespass* in unlading upon “his ground, yet he might “not take it as a certain “common toll.”

remedial, and mandatory, confirming and enforcing the *ancient custom*, and directing that the sand shall be unloaded and landed, &c. upon such adjoining places as have been used within fifty years, and be carried away by such ways as have been used within the last twenty years, saving to the owners of such places and ways, their reasonable right of toll and charge for such easements.

Here then is a customary right of common, or *profit-a-prendre*, recognized and confirmed by statute law as belonging to all the inhabitants of Devon and Cornwall;—not merely to the “owners of ancient tenements “in their *que estate*,” but to all the “residents and dwellers” in those counties. It is manifest, therefore, that, according to the statute, a right of common *a-prendre* for digging sand existed, as an ancient custom, or usage, by *prescription* in two of the largest and most populous maritime counties of England. This custom so allowed would seem to be in opposition to the doctrine of Gateward’s case, decided in the fourth year of the same reign, only three years prior to the statute, if it be regarded as a *local* custom. Therefore, in order to support the doctrine in Gateward’s case, it must be assumed, (in opposition to the positive words of the statute,) that no such *profit-a-prendre* existed in the inhabitants of those counties prior to the statute, on the ground that such custom could

not, according to law, be in "inhabitants," as such.

Gateward's
case and the
statute con-
trasted.

Yet the language of the statute certainly authorizes us to assume it to have been either a good general, or good local custom, independent of and prior to that statute; whilst Gateward's case decides that, considered merely as a *profit-a-prendre*, it could not have been a good *local* custom, *causa qua supra*. It would seem to follow, therefore, that if it could not be good as a *local* custom, it can be good *no otherwise* than as a *general* custom, in the same manner as the common of piscary in the sea and shore is a good custom, (although a *profit-a-prendre*) as a general custom of the realm. That which is a good general custom of the realm, is good alike for Cornwall and Sussex, or any other maritime county. It cannot be supposed that such a custom, or such use of the shore, did not prevail as much in Dorset, Hants, or Sussex, and other maritime counties, as in Devon and Cornwall. All these were and are agricultural counties; and their farmers were then, and are now in the habit of manuring their lands, as well as the men of Devon and Cornwall; and it must be supposed knew as well the value and use of sand, or shells, or sea-weed, &c. for manure. There is every reason to believe that what the statute affirms to have been the old customary right of the Devonshire and Cornish men, was equally a

practice in the other maritime counties. If so, the statute could not have set up a new, or merely local privilege.

But although the statute is not silent, the books certainly are; for the general right in question cannot be specifically traced in any of them, as a Common law privilege; neither is it *denied* by the books. In this view it resembles the question raised in the preceding case of *Blundell v. Caterall*, regarding the right to bathe in the sea. It also resembles it, in that it is as difficult to say, that the practice of resorting to the sea-shore for materials, for the uses just mentioned, has *not* prevailed, time out of mind, throughout *all* our maritime counties. In this respect, also, it resembles the public right to catch fish on the shore. In some places on the coast it would be impossible to prove that any one had *actually* been accustomed to catch shell-fish upon the "shore;" but this will not invalidate the general right. Common sense and experience entitle us to assume, that fishing on the shore is far *more* general than the *not* fishing there at all. Yet it would be difficult to say, that *shell-fish* fishing is a custom more frequent or general than the digging and taking materials from the shore for useful purposes. The presumption is in favour of *both*, as general and immemorial practices. It may reasonably be doubted, whether the men of Devon and Cornwall have not carried away from the shore as

The books are
silent both
ways.

much shells, sand, &c., and from as many places, as they have carried away shell-fish. Nor would it be easy nor reasonable to contend, that the men of Dorset or Hants have not exercised, in an equal degree, these several privileges. If it be admitted that the *presumption* is in favour of it, as a general *practice*, and that the practice is a great public benefit to the agriculture of the kingdom, why should not that suffice to warrant it as a lawful public *custom*?—our *books* being *silent* alike as to the negative or affirmative of the point, but, in *general language*, favouring it.

Importance
of the custom
to agriculture
and the general
interests of
the realm.

That it is a privilege very beneficial and important to the general advancement of agriculture and for other public purposes, cannot be denied: these are interests not *local* but *general*. Now it appears, that as a *local* custom it cannot be supported at law in favour of the “inhabitants” of the coasts of England; because there exists a legal technical objection^o to its being so pleaded. In this respect it is in a worse situation than the right to *bathe*; for *that*, not being a *profit*, might, perhaps, be pleaded as a *local* custom by the “inhabitants,” and as an “easement.” But there is no mode by which the inhabitants of the maritime counties can maintain a right to manure their lands from the materials cast upon the shores of their coasts, except *that* which supports the public fishery, viz., the general custom of the

^o Gateward's case.

realm. The men of Devon and Cornwall indeed may plead their statute, but the Statute law has done nothing for the other counties. This statute of James, however, can scarcely be construed into evidence that the general common law right did *not* exist before; although such construction was attempted. If it *did* exist before, the statute certainly could not have abrogated it; for it is an affirmative and declaratory statute; and also in its operation *local*. No just or fair inference can be drawn from this partial statute to negative the right of other inhabitants of other maritime districts to a like privilege by common law. The statute did not confer this right as a *new* privilege, even upon these two counties, as appears by the very words of the statute itself.¹

It will not be denied that agriculture is as ancient and as important a pursuit as fishing or navigation. The public interests are as much concerned in the one as in the other. It would also be difficult to contend, that the agricultural interests of *all* the maritime counties in the kingdom are *not* to be regarded as the general public interests of the realm. The right in question partakes of the character of the interests to which it is made subservient.

The custom
coeval with
the culture of
land.

And as general.

¹ If it be a fact, that in nine tenths of the maritime districts, this privilege is, and has immemorially been exercised by all mankind who chose to do it, without toll or hindrance, it would seem to follow that, as "custom," it is no more "local" than the fishery.

It is subservient to the agricultural interests of all the maritime counties of the realm; a range large enough to entitle it to be called a *general* public benefit, even as the fishery is a general right and benefit, although actually limited to the maritime districts. There seems no substantial reason why the one "*communis usus*" of the shore might not be supported by the Courts, on public grounds and general usage, as well as the other. The *practice* is in favour of it; the public interests are in favour of it; and the Statute law, as far as it goes, is in favour of it. The silence of the "books" is neutral. There was a time when the books were equally silent in regard to the fisheries; yet the fisheries subsisted at that time by the Common law. At that time, also, agriculture subsisted in the same districts where the fisheries were carried on. Probably agriculture was the *most* ancient of the two pursuits; and unless it be assumed that agriculture is a *modern* invention, as bathing was assumed to be, then, so far at least as regards the application of the several useful manures furnished *spontaneously* by the sea and sea-shore, the taking and using such manures must have prevailed in the very manner by law required to establish a general Common law custom, viz., immemorially and generally.

Antiquity of
the practice of
using marine
manures in
agriculture.

It is reasonable to conclude, that the use of these natural manures, so plentifully offered and so accessible, was more ancient than of those

more artificial kinds which require greater science and skill than was anciently in vogue.³ It may be supposed that some of these artificial kinds of manure have superseded, in some places, the frequent use of the soil of the shore; and perhaps it would appear that in other places the natural products of the shore have been more than ever resorted to for manures, where modern research has detected new soils, or new modes of combining such soils so as to increase the productive powers of land in tillage. In the same manner alterations and improvements have occurred in the fisheries. And when it is considered, that such common right to use the shore of the realm would include within its range not the open shores of the sea only, but the shores of all creeks and arms of the sea, and of tide-rivers, the value and utility of such a privilege to the public cannot be questioned. Every species

And its extent
and utility.

³ Agriculture, however, as an art, is of great antiquity in Britain. Julius Cæsar speaks of it as having been introduced into the *southern* parts of Britain from Gaul, a century before his invasion. Cæs. de Bell. Gall. lib. 5, ch. 12. By which it would seem that the *maritime* districts were the *first* to practise it as an *art*. It appears also, from Pliny, that we were *then* acquainted with *manures*, as he speaks of the wonderful effects of our *marl*-ing our

fields. There is no doubt but that *lime* was also used both in Gaul and in Britain, in those early times; and this is an artificial preparation of a manure to increase its powers. There is no doubt too but that the coming of the Romans into Britain introduced their improved modes of tillage; and, at that time, the Romans had studied agriculture as a science, and it was held in particular honour by that great and wise people.

of natural manure is to be found within this extensive range, as well as other products capable of conversion into rich manures by artificial processes. Some (such as chalk,) are used both in the natural state, and also after being improved by artificial processes.⁴

The right to towing paths is not a general right along navigable rivers.

In the case of *Ball v. Herbert*,⁵ a right to use *towing-paths*, along the *banks* of navigable rivers, was contended for, as a general public privilege for all the subjects of the realm. But it was decided by Lord Kenyon, and other judges, (and it is conceived most reasonably,) that no such general custom existed at law. The naturally navigable rivers, subject to the tides, are so very *few* in these

⁴ In a book of agriculture of great authority (Sir John Sinclair's Code of Agriculture) it is said, p. 40, "an object deserving consideration is the situation of the farm regarding manures; for an easy access to lime, chalk, marl, seaweed, &c. is of essential advantage to cultivation." In various parts of the same work, the manures furnished by the "shore" are spoken of in the highest terms. Thus in p. 242, "sea-ooze is mentioned as "of a most enriching nature." In p. 243-4, sea-weed is described as good for arable lands; and the late Duke of Richmond is stated to have used it in *Sussex*. Tangle, or drifted sea-ware, is extolled p. 243-4,

as having "several advantages over other sorts of manure." Sea-shells are said "to abound in various parts of the British Isles," and these, together with sea-sand, are spoken of as excellent manures; and are stated to be in use, not in Devon and Cornwall only, but in the *North and East Ridings of Yorkshire*, and in *Scotland*. It is also remarked, that "farmers prefer taking it as near the low-water mark as possible," p. 238. Indeed, the books written upon this interesting subject of agriculture, uniformly allude to the use of sea-shore manures as quite common and universal throughout the kingdom.

⁵ 3 T. R. 253.

kingdoms, that the practice of towing could not be regarded as *general*. The character of the right partook of the limited nature of the custom. It was, accordingly, decided by the court, that as a *local* custom it might be good, but not as a general right. The public right to navigate the seas and tide rivers, is a right of way, *not* upon the *terra firma*, but upon and over those seas and tide rivers.—Even granting a right to use the *ripam* along the coast, so far as it is reasonably essential to fishing and navigation, still such right must be general in its quality, and such only as is *necessary* to the fishing and navigation, as *generally* carried on. Towing, in fact, seems to begin where navigation, properly so called, ends. It is very limited both in place and practice, so far as tide rivers are concerned.

Now, in this case,⁶ Lord Kenyon, addressing himself to the question of general common law rights, says, “Common law rights are “either to be found in the opinions of lawyers, delivered as axioms, or to be collected “from the universal and immemorial usage “throughout the country.” It seems, then, that *either* of these grounds will suffice. It may, it is conceived, be “collected from universal and immemorial usage,” that the seashore has been resorted to for the purposes in

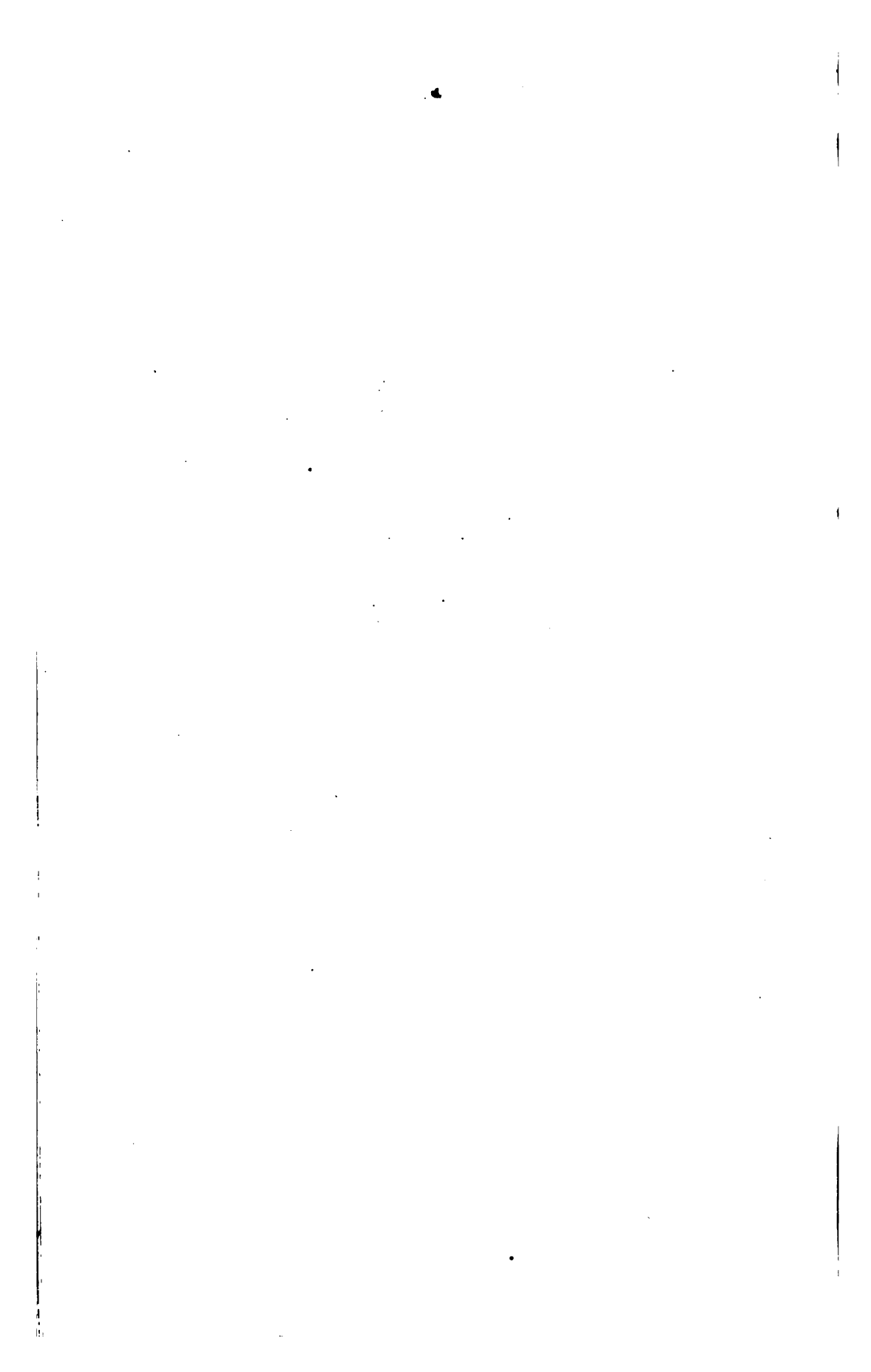
⁶ Ball v. Herbert, 3 T. R. 261, Lord Kenyon's doctrine as to general Common law rights.

question, not in a few places, or in two counties only, but *generally* throughout the realm. It is a custom quite in contrast with that of towag: it is, in fact, essentially, and in its nature *general*; as agriculture is general, and the manuring of lands general, and the products of the shore are also as generally applicable and available in one part of the kingdom as another.

The support
of the custom
desirable on
grounds of
public utility.

It is, therefore, on all accounts desirable, that the custom in question should be supported, if possible, as a general common law right. As a *local* custom it is liable to be limited in extent and utility; the materials, in such case, cannot be legally carried away, used, or sold for use out of the precincts of the manor; besides, local customs may be *lost* by disuse, and cannot be revived. Ignorance, prejudice, want of capital, or of enterprize, or of means of conveyance, may, for a time, induce a neglect of the advantages afforded by the "sea-shore," in particular districts, until the right is lost by disuse, to the no small injury of the agriculture of those places. If the custom, as a local custom, cannot be proved to have existed within the memory of the inhabitants, it may be lost for ever; and however inclined, or capable, the next generation may be to use those advantages which their predecessors neglected, it is too late. It is well known, that in many places on the coast which

had long been supposed destitute of good materials for manure, the finest manures have been ultimately found, either by accident, or scientific research. But the memory of man may not warrant its being taken, as a *local* privilege. So, the daily alterations which take place along the coast, by the action of storms and tides, will bring or lay open the finest manures, where there had been none for use before. But neither neglect, nor accident, can operate to destroy or prejudice a general common law custom. It cannot be lost by local disuse; and it may, at any time, be revived into use for the public good. Such is the case with the "fishery;" and, nationally speaking, so it should be with the custom in question.



APPENDIX.

SUSSEX SUMMER ASSIZES, 1822.

*Leves, Tuesday, August 6th ; before Mr. Justice
Park and a Special Jury.*

DICKENS AND ANOTHER *v.* SHAW.¹

THIS was an action of trespass brought by the lords of the manor of Brighton, against the defendant Shaw, for digging and taking away sand from the sea-shore of Brighton. The defendant pleaded *not guilty*, putting it upon the plaintiffs to prove their title to the *locus in quo*.

¹ This Case was recently put into the author's hands, too late to be noticed in the foregoing Essay, which was then in the press. The author was well aware that such a case had been judicially decided ; it having excited considerable interest in his native town ; but it had not come to his knowledge

that a report of the case existed in print. It is printed and published in quarto, by J. Forbes, Market-street, Brighton, and consists of 60 pages, apparently very fully and accurately taken by some short-hand writer. It is necessarily abridged in this place.

privilege of landing them. It is incidental to the right of fishing, to bring the fish on shore.²

"But if this toll is a compensation for the use of the capstans and fish-market, which are on the lord's soil, then the payment is legal,³ and intelligible."

"That wrecks have sometimes been taken is not denied,—but wrecks are generally thrown up at the top of the tide; if the property come ashore in a gale, it will be thrown up considerably above high-water mark."

Mr. Justice Park.—"That depends upon the weight of it."

Counsel.—"Generally speaking, in violent gales of wind the property will be thrown up above the ordinary high-water mark; or at the summit of the tide. Now a man may have a right to wreck, and yet not have a right to the soil; for nothing is more common, (as is well known to those conversant with such subjects,); than to find the grant of a manor, with a right to wreck of the sea, without any grant of the soil, between high and low-water mark,⁴ included in it."

"The digging for sand is assumed to be an injury, for a tide or two, to the boatmen coming on shore in the night, who may be ignorant of the removal of the solid sand, and may get into lighter sand. We are not contending whether the inhabitants of Brighton shall be supplied with sand or not, on account of this assumed nuisance. Brighton must be supplied with sand, and as Brighton has increased ten times in extent, it must be supplied with ten times the quantity of sand. But this injury, or nuisance, would be precisely the same if a payment were made to the lord of the manor for his permission to dig, (as is now claimed) as it would be if they dug without the payment; but the truth

² See p. 48. 209, and 220; ante.

³ But see note to p. 250, ante.

⁴ See accordingly, p. 15 and 16,

ante. Grants of the shore are noticed by Lord Hale as *singular*, rather than as common or *general* cases.

is, this claim is now brought forward for the private pecuniary advantage of the lord of the manor. But the people have dug there, according to the testimony of a witness of fourscore, during all his time, without any such claim or interruption till within the last three years; and the question is—if these men shall be shut out from doing that which persons have done at all times, and which the inhabitants of Brighton have done at all times;—for, as the old witness said, if any body interfered, they only got some impertinence for their trouble. If it has been done at all times, and exercised at all times, in defiance of the lord, by what right is it that the lord now seeks payment for his permission, which is a new assertion of a claim made by him in the total absence of any such right, as far back as the memory of any living witness can reach? And there is not any reason to believe that sand was not dug at all times.”

“The increase of the practice has been with the increase of the town,—for they must dig for the convenience of the town; and the lord of the manor, who has permitted this practice so long, has *now* no right, even if he *originally* had a right to interpose. He has no jurisdiction over the soil, nor any right to derive a profit for his consent to dig there. He has not interposed with respect to *shingle*.⁵”

“Under these circumstances, the question is a very important one; for, if the lord of this manor be proprietor of the soil between high and low-water mark, not a cart could go down without his consent, and paying toll, to unload a vessel. But no such claim has ever been made. But if the lord were proprietor of the soil, and if he has a right to require money for his permission to dig sand, he

⁵ Shingle, or the “beach,” has immemorably been taken as freely as the sand, for “ballast” for the fishing-boats, and ships resorting to the shores, and for road mending, and other useful purposes.

So sea-weed, or tangle, when thrown up in any quantity, has been taken, and carted away for manure, without toll or payment of any kind.

might require something from the owners of carts coming to unload the merchant ships. If the plaintiffs should succeed to-day, not only might such claim be made, but the whole use of Brighton, as a bathing-place, will be done away with: for if it is once established, that the lord is proprietor of the soil, no person will have a right to cross the sand, without his permission, with bathing-machines,⁶ which have been there as long as memory can go, but for which no claim has ever been made."

"All the various uses of the beach, in the various modes stated, must all be affected by the verdict. These people have been in the habit of taking sand perpetually, without interruption, except that the reeve says, he has interfered when a cart went in front of the bathing machines. It is said that these gentlemen are only desirous to prevent injury to the mariners and fishermen, as if the injury would be much diminished if they took a compensation; but there would not be any difference whatever as to the danger, nor would it be at all diminished in consequence of any payment to the lords—the consumption would be quite the same. It appears that the flux and reflux of the tide extends to five or six hundred feet."

Mr. Justice Park.—Gentlemen of the Jury,—“This is an action of trespass, which is brought by two gentlemen who appear, by the evidence, as well as the record, to be lords of the manor of Brighton: and the action is brought against the defendant for digging in a certain close of the plaintiffs, on the sea beach. The defendant does not put in any plea on the ground of jurisdiction, as he might have done, but he contents himself with saying, that he is not guilty, which is quite enough to put it on the plaintiffs to show that the soil is theirs. The learned counsel for the defendant has stated, in very strong language, the danger that would ensue by your giving a verdict for the plaintiffs: he thinks the natural consequence would be, that all the bathing

⁶ As to this, see p. 202, ante.

would be stopped, and that all the persons who get coals from the ships would not be able to continue to do so, and that these and other consequences would follow. To me this case does not seem fraught with such difficulty; for if you establish that these gentlemen are not only lords of the manor, as they *are*, undoubtedly, *above* high water mark—but whether they are between high and low-water mark is for you—it is not because a person is owner of the land, that he is to shut out me, or any other man, from that which we have been in the constant exercise of for years; *that* does not follow. The learned counsel for the plaintiffs has put in my hand an Act of Parliament, which I am bound to take judicial notice of. It is an act of the 50th of Geo. III. chap. 38, which is about 1810; and there is this clause found in it:—"Provided always, that this
 "act, or any thing herein contained, or in any bye-law,
 "rule, order, or regulation, to be made by the said commissioners as aforesaid, shall not extend, or be construed
 "to extend, to authorize or empower the standing or using
 "of any bathing-machine upon any part of the beach or
 "coast of the sea, adjoining to the said town, or in any
 "wise to authorize or empower the said commissioners, in
 "any manner, to dig away, disturb, or remove the soil,
 "chalk, sand, or other materials of the cliff, or the rock,
 "stone, beach, or sand on the sea-shore, within the said
 "town, without the consent of the lords of the manor of
 "Brighthelmston, or the consent of any person or persons
 "who, by reason of property in the soil or otherwise, may
 "legally be entitled to prohibit or prevent the same."
 This is a very strong clause certainly, and therefore certainly it did contemplate that, by possibility, other persons than those who have a general legal right by law, had a right there.⁷

⁷ This act of parliament was not brought forward again, upon the motion for a new trial; and, indeed, it is difficult to say of what

real service it could have been in the argument, since whether the lords *were* "legally entitled" or not was the question.

"Gentlemen, you have been truly told by the counsel on both sides, that, generally speaking, a lord of the manor, which manor has a beach adjoining it, is not necessarily thereby entitled to the land under the flux and reflux of the sea. That is so; the king is lord of all the land between high and low-water mark; but, at the same time, it is not only possible, but is often proved to be the case, that grants have been made from the king, of this soil to his subjects. And there are instances in which this right is obtained, not from grants from the king, but by long prescription.⁸ Lord Hale, in his book *de jure Maris*, lays down the law upon this subject in a manner which is very striking; and he refers to that sort of evidence as is required by judge and jury, as to the high and low-water mark. He says, "The ordinary neap tide is the boundary of that which is properly called the *littus maris*; and touching this kind of 'shore,' viz. that which is covered by the *ordinary* flux of the sea, (and we must look to what it is in ordinary times,) he says, "this may belong to a subject, the statute of the 7th of James I. chap. 18, supposeth it;"⁹ for it provides that those of Cornwall and Devon may fetch sea-sand for the bettering of their lands, and shall not be hindered by those who have their lands adjoining to the sea-coast, which it appears by the statute they could not formerly." Then he goes on to show what the proof should be in such cases; and he says this, amongst other things, "enjoyment of wreck, happening upon the sand; presentment and punishment of *purprestures*¹ there, in the court of a

⁸ As to this, see p. 22, et seq.

⁹ See the stat. p. 102, and see p. 251.

¹ Where there is a house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a

"*purpresture*," from the French word "*pourpris*," an inclosure. *Blac. Com.* vol. 4. Thus, then, if the lord of a manor, on the coast, has enjoyed the jurisdiction in his manor court, of presenting, punishing, and putting down inclosures and nuisances upon the "shore," it is a badge to show,

manor, and such like." Why then, this particular species of property, which we are now considering, has not the same means of enjoyment as a man has over land of another description, because it is impossible it should be enjoyed in the same way.² The question is, if there has not been in this manor, for a considerable number of years, all that enjoyment, [by the lord,] of the "shore," which has been pointed out by Lord Hale. William Murrell says, he has been reeve for the manor of Brighton, to the plaintiffs, for seventeen years; and, in the course of that employ, has seized *wrecks* whenever they were found between high and low-water mark, and he never seized any wreck above. Upon that subject Lord Hale says—"For the most part, wrecks and royal fish are not, and, indeed, cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land; but these are perquisites which happen generally between the high-water mark and the low-water mark; for the sea, withdrawing at the ebb, leaves the wreck upon the shore."³ The reeve says, "the last seizure he made was of four top-masts:" he says, "I have seized different pieces of timber during this period, but nothing of any particular value. Three different times I have seized. When I have seized, I have always carried them up to Mr. Kemp (the lord). Upon all occasions this has been accounted for to the Lord." Then he goes on to speak of paying for the mackarel. I agree, to a certain extent, with what has

that the "shore" is within and part of the manorial waste; because, otherwise, the act would not be an offence against the lord, but against the king, and cognizable only in the king's courts.

² See p. 100, ante. There may be a difference in the *quantum* of enjoyment, profit, or use; but both the soil of the shore, and of the *terra firma*, must be enjoyed the *same way*; the one being capable of *fewer* uses than the

other. The inclosing, digging sand, stones, &c. and otherwise converting the *soil itself* to profit, are the same modes of enjoyment as may be had in inland estates. There is much barren soil far from the sea, the only uses of which are such as the "shore" may be applied to. As to the taking of sand, &c. see p. 101 and 225, et seq.

³ See p. 83, et seq.

been said upon that by the learned counsel for the defendant. I do not think much weight is to be placed on that circumstance, except this, that it is a strong confirmation to show these gentlemen are lords of the soil *above* the high-water mark. They (the fishermen) put down the capstans all over the place; nobody trouble themselves about it; but whenever the reeve saw it, he gave them leave, if he was down near the spot; if not, he has sanctioned it. But the mackarel are evidently paid for the use of the capstans, for taking care of them, and keeping them in order, and to prevent people misusing them; therefore I do not think much reliance can be placed on that circumstance. "Sometimes," says the reeve, "the fishermen disagree about boats coming ashore before the capstans; and they send for me, and I have gone several times with my horse, and drawn the boats away. The capstans are removed from time to time." He says, "when there have been disputes among the bathing people, I am sometimes referred to, the same as with the fishermen; I have removed carts from before bathing-machines, where they have been digging, as it prevented them getting the machines down." One witness says, one of his men was *nearly* lost by their having made a hole, by digging for sand, which had not been filled up by the tide; so, persons going to bathe, not knowing of these holes, might be, *perhaps*, drowned. It is said, that the taking of sand from the beach has been done at all times. I have no doubt 'but where people wanted a *few spades* of sand, they have taken it from the beach, and nothing has been said; and if it had been but a *few spades*, it is probable that nothing would have been said now.⁴ But it is a very different thing from taking loose sand which has floated up, and scraping it up, to digging it and carrying

⁴ Sand, as a material for mortar, for building, to say nothing of its other uses, must always have been used in considerable

quantities at Brighton, and not as here supposed by the learned judge.

it away by carts' full. If, however, the defendant has this right, he has a right to retain it. The witness says, "I had a conversation with Shaw (the defendant) on the subject of taking the sand; I have gone two or three times before the 22nd of February; the defendant spoke to me first; he said he had been served with a notice, and he was afraid he should get into trouble; that there had been a subscription amongst the tradesmen, and they had advised him not to pay, until such time as they had had their meeting, as they meant to stand a trial with the lords of the manor." However, gentlemen, though this was said by the defendant, if the plaintiffs cannot make out their case to your satisfaction, the defendant must have a verdict. It lies on the plaintiffs to make a good case. Then the witness (the reeve) is questioned as to the situation of the fish-market, and he says, "it is *above* high-water mark;" and he says, "the fishermen send their fish on shore, in *wherries*, when the water is not sufficiently high to let the fishing-boats come up to the beach; when *it is*, they come up to a particular part of the beach, and, as soon as they have unloaded, they go to sea again." It is supposed, that the wrecks which this man spoke of, are of no great value, there being but very few instances that any living witness speaks to. One of them, which this witness speaks of, sold for eight or nine pounds, reduced by the expenses of bringing it to him for the lord, to the real profit of two pounds fifteen shillings. Then he speaks of another, where the lord got about four pounds. He says, all the wrecks between high and low-water mark, he has always appropriated to the use of the lord. Then Samuel Carden is called; he says—"I am turned of fourscore: I have resided at Brighton all my time, and am a fisherman. He always understood the lord of the manor took the wrecks. He cannot speak of any particular instance. He remembers last winter a man of his had like to have been lost, by falling into one of the holes which had been dug

in the sand." He is then asked as to the payment of the mackarel, and as to the capstans, and does not vary from the evidence given by Murrell (the reeve). Other witnesses spoke to the same effect. Then James Blunden is called, and he produces the court rolls of the manor, to show that grants of part of the waste have been made by the lord. The use of these entries is to show, that this has been a manor from all times; at least, from 1662 we have entries. Then, as to the taking of wreck, what has been said by the witness is confirmed by two or three instances, which are recorded in the rolls of court. Now, as to these *grants*; I will mention the case of John Williams, amongst others. This appears to be a very strong instance, *as far as it goes*.⁵ The witness then goes on to show, that on the 31st of March, 1743, there was a presentment of a piece of a mast, which was taken up and disposed of to the use of the lord, according to the custom of the manor. And also a small cask of brandy, containing about six gallons, taken up on the coast as a wreck of the sea, and which was seized (as they say) for the use of the lord. And, also, at the same court, there is an entry of a piece of east-country oak, which was taken and disposed

⁵ The grant to Williams was as follows:—May 27, 1813. "To John Williams of a piece of land, containing in length, from east to west, at the south end, twenty-two feet and nine inches, *abutting to the sea-beach on the south* and west, and the ground of the said John Williams on the north, and the ground in the occupation of Richard Russel Kemp on the east, by the year's rent of three guineas, on the feast of St. Michael the archangel, without deduction." There is nothing in this grant to show that it was a grant of ground *below* high-water mark. The abutment to the south is on the "sea-beach," which, in common under-

standing, means to the *high*-water mark. There is no measurement of the *depth*, southward; if it was meant to be to the *low*-water mark, it would have been so said. The sea-beach is the ground between the "flux and reflux of the tide," and extends here to from six to seven hundred feet. There is now a high road formed *between* Williams's premises and the sea. This road is protected, towards the sea, by a wall, and, at ordinary tides, this wall is not washed by the sea. Williams's title, under the grant, seems safest as a grant of soil *above* high-water mark, as *that* excludes the claim of the crown.

of for the use of the lord. So that here we have three instances of wreck, eighty years ago, in the very place. This is, certainly, a very strong fact in favour of the plaintiffs; *at least*, it shows that it was never questioned that they had *this* right. On the 29th of January, 1746, there is a presentment of two small casks of brandy and a piece of pipe of oil; these are both taken and appropriated to the use of the lord. Now, gentlemen, *these are all very strong instances in favour of the right contended for*. The learned counsel for the defendant has stated, with truth, that there has been no instance, until of late years, of any prevention of taking *sand*. I have no doubt of it: for, as we know, a few years back the demand for it was not very great; and, when they took but little, there being no demand for it, then there was no interruption; but when a man comes down constantly, and when a *variety of men* come down and dig holes in the sand, in a manner which must be very inconvenient, it then well became those who are the lords of the soil (if the plaintiffs *are* lords of the soil) to interfere, even if they propose to themselves to derive an emolument from giving permission to take it.

Gentlemen, this is the whole of the case. If this case had been met by *other* evidence, it *might* have been a *very difficult* thing for the plaintiffs to have made out their rights. It is, however, to be observed, that all the evidence, such as it is, *is all one way*. The whole must depend on the nature of the property, and the use of it. The nature of it is such, that there can have been but very little use of it. If they had been in the habit of taking money for the use of the bathing-machines, or for the landing of coals,⁶ then the evidence would have been very strong; but you must take it as it is: it is for you to say, if there has been an exercise of the right, such as from the nature of the property admitted of. If the evidence, such as it is,

⁶ But see p. 250, note.

and uncontradicted, is not sufficient, in your opinion, to entitle the plaintiffs to a verdict; if you think it too slight, and if you think that this thing has been in the habit of being constantly done without any complaint or interruption, you will find for the defendant; if not, you will find a verdict for the plaintiffs, with one shilling damages."

Juror.—My lord, admitting that the lord is entitled to wreck, between high and low-water mark, does it follow that he is entitled to the *fee simple of the land* between high and low-water mark?

Mr. Justice Park.—Generally speaking, the lord is not entitled to that. The lord of the manor *may* have the grant of the soil between high and low-water mark; but, by the law of England, the king has a right to the soil between high and low-water mark; yet the subject may be in possession of it by *grant* or *prescription*, and that is evidence from which you may draw an inference.

Juror.—If the lord is entitled to wreck, should your lordship think he would be entitled to the soil?

Mr. Justice Park.—If uncontradicted.

Juror.—I was in hopes we should have seen the original grant.

Mr. Justice Park.—That, from the nature of things, cannot be, but in a very few instances.

Verdict for the defendant.

The counsel for the plaintiffs having obtained a rule to show cause why a new trial should not be granted, the case was argued in Hilary Term, 1823, February 13th, in the King's Bench, and the same printed report is in substance, as follows:—

Mr. Justice Best read the report of the learned judge who tried the cause.

At the conclusion of the report, Mr. Justice Park observed:—"The jury debated some time; then they said,

they should like to see the grant; I told them there was none produced, and probably none could be produced. I explained to them the law, as to the prescriptive right. On their return they found their verdict for the defendant, with which I was not satisfied."

Mr. Marryat (against the rule).—This was a verdict by a special jury. The question was decided conformably to the common law presumption, and there was nothing to affect or turn that presumption, unless the circumstance of the plaintiffs having taken the wreck of the sea can be so considered; for I shall not dispute, nor did I dispute at the trial, that there was sufficient evidence that the plaintiffs, as lords of the manor, had the right of wreck.

Mr. Justice Bayley.—We will hear you, Mr. Courthope.

Mr. Courthope (for the rule).—It was said there was nothing to answer the common law right, except the circumstance of wrecks being claimed by the lord. As to the common law right being unquestionably in the king, that, of course, I cannot dispute. I am not here to dispute the common law right; but this is a case where all the evidence, whatever evidence there was, was all on one side.

Mr. Justice Best.—It is stated, that, till lately, all mankind that chose, took sand.

Mr. Courthope.—That does not establish the right of all mankind to the soil.

Mr. Justice Bayley.—No; but it has a tendency to show that the soil was not where you say it was.

Mr. Courthope.—All mankind taking it cannot establish the right; the right to the soil would still be vested in the king, or in his grantee. The question is—whether all persons, and every person who please, at his or their own will and pleasure, has a right to deal with this soil. That is the only question; and I contend the evidence, as to *that*, is all one way; for no evidence was given to show any right being elsewhere. There is no claim made on the part of the crown; there is no right set up on the part of the crown.

Mr. Justice Best.—If the crown had any occasion to make use of this soil for any purpose of navigation, then the question would be—whether there was any thing to preclude the crown from that.

Mr. Courthope.—The inquiry is—whether this is a verdict against evidence. I submit that the evidence was decidedly in our favour; and I not only rely upon that, but also I should have thought that the expression of my Lord Hale, and not of Lord Hale only, but in Constable's case, reported in Coke, which is to the same effect, would have put this matter beyond all doubt. I think the expressions are—"I observe three things," &c. &c.—"*thence it follows* that it was part of the manor."⁶—Perhaps your lordships could not go so far as to say, "*thence it follows.*" I do not go so far as that; but after such an authority, and after the expression of Lord Hale, I may be permitted to say, it was very important evidence to show that the right was in that party who had the right of wreck.

Mr. Justice Best.—My Lord Hale *does not put it on wreck only*; there is the constant fetching of sand.⁷—*Prima facie*, the soil is in the crown, and *prima facie* the right of wreck is in the crown; but the crown may grant the privilege of wreck to the lord of the manor without granting a right in the soil; or the crown may grant a right in the soil without granting the right of wreck; or the crown may grant *both* rights to the lord of the manor; but the person who claims the right in the soil, must make out that right to the satisfaction of a jury.

Mr. Courthope.—That would be very important, if there was any evidence offered on the other side; for, generally speaking, the weight of evidence is to be considered with reference to the evidence which is given in answer. I have always understood this was considered,—that "*wreck*," in the absence of all other evidence, is very important evi-

⁶ See note to p. 83, ante, for this quotation. ⁷ P. 83, ante.

dence. I by no means contend that a proof of wreck is decisive on the subject, but only what weight the evidence of wreck ought to have, where there is no evidence on the other side. I would contend with great deference, after the expressions which have dropped from the court, that the taking of sand is no evidence of a right elsewhere. I do imagine that where sand was taken by a variety of individuals, having no claim to the soil, that it generally went to establish that the soil was not in any of those individuals, because they take it as the right of all mankind—who can have no such title; therefore it shows a general right in some individual;—and therefore I should think the question fairly to be between the crown and its grantees, whether it were in one or the other. I certainly feel *that* was a very important piece of evidence, in the absence of all evidence to the contrary;—but I am anxious not to be considered as resting on the right of wreck alone; the circumstance of wreck being in the grantee of the crown, is important evidence in the absence of all evidence on the other side. The court will not consider *all* the instances mentioned by Lord Hale, as instances which are all to be taken *conjointly*,—he merely mentions them as instances of cases by which the right may be established. It is a *species* of evidence—and how is it confirmed in the instance here of a grant to Williams, which is, unquestionably, on part of the property in question?—property which is below the high-water mark. The lord is here exercising that most important of all rights, dealing with the soil, by making a grant of it at court—making a grant of it to another individual.

Mr. Justice Bayley.—What is the date of that grant?

Mr. Marryat.—1813.

Mr. Courthope.—I admit that 1813 is a late date; but still it is undisputed. All I contend for is—that, as the

• See note to p. 274 of Appendix this assertion.
which does not seem to support

crown has not disputed it, here are individuals who undoubtedly are exercising a right, which I am sure must be felt by the court as very important, and *which it is fit some person should regulate*. There are large holes dug, endangering the lives of the fishermen.

Mr. Justice Best.—I should think the proper remedy would be, by *indicting* them for it;—certainly, it is a very abominable nuisance.⁹

Mr. Courthope.—But it has been tried as a private right; and, suppose it was the only piece of evidence, there is this,—which on such a subject, I think, is a most important piece of evidence,—it is the constant and invariable interference of the reeve for regulating all disputes; it shows that, instead of being a subject of public regulation, a private right has always been considered as existing in the lord. If when these instances had occurred, some public proceeding, some application to the crown to remedy the nuisance, had been adopted,—it would have been evidence that the right was in the crown: but the universal application has been to the reeve, the lord's representative.

Mr. Justice Bayley.—You mean about removing the carts?

Mr. Courthope.—No; filling up the holes. These holes are great nuisances, as they are considerably below high-water mark. They are nuisances to bathers, and to persons bringing up their boats,—both these descriptions of persons, whenever these nuisances have occurred, have applied to the reeve, instead of applying to the crown; which would have been done, if, as has been

⁹ Probably, if inquired into, it might not be found to be very frequent, or dangerous; and one instance of punishment, as a nuisance, might restrain it. The act of parliament cited by the learned judge (Park) at the trial, an act vesting various powers in com-

missioners, for the regulation of the town, (it not being incorporated), would probably have provided an effectual remedy for all disputes and nuisances affecting the shore, had the act been framed *after*, instead of *before*, his trial.

suggested, the crown, for the public purpose of navigation, has this property vested in it; and then some public inquiry would have taken place, and some public prosecution would have been instituted.

Mr. Justice Bayley.—Are not you overstating that?—What instance of application did any witness speak of, except one, which was an application two years ago to Mr. Murrell?

Mr. Courthope.—I do not affect to state the exact number of times;—I am making only a general observation—not as applicable to any particular interference—that when these nuisances have occurred, application has been made to the reeve, to remedy them.

Mr. Bolland.—Murrell himself says, (I have this from my own note,) that he had removed the sand people a great many times. He was a very old witness—eighty years of age. He says, he has sometimes been applied to about these holes, by the people belonging to machines,—that they were nuisances, as they prevented the getting down the machines.

Mr. Justice Bayley.—They *were* nuisances; and when there was any nuisance, they always applied to Murrell, and he remedied it.¹

Mr. Courthope.—Therefore, by the application to the reeve, who is the representative of the lord of the manor, he was treated and recognized as the person who had the superintendence of, and the interest in the soil.

Mr. Justice Best.—I suppose this was all very strongly pressed on the jury; and, if we were to grant you a new trial, you would hardly get more than one shilling damages, and you would have to pay the costs for a new trial.

¹ The learned judge, no doubt, means here to assent to the matter of fact, viz. that the reeve's interference was attended to. But how did he remedy it? There is no evidence of "presenting and punishing purprestures" in the manor court. But this

was the only *official* way that the reeve could interfere. It was in evidence, that at the times when he interfered, "the sand people resisted it, and were saucy;"—but no jurisdiction was exercised to punish them.

Mr. Justice Bayley.—This does not conclude any thing.

Mr. Courthope.—We had no opportunity of observing on any of the remarks made by my learned friend.

Mr. Justice Bayley.—You may hereafter, in any other action, if they should venture to repeat the thing again ;—you will have a right to bring another action, and you may then be able to show that, in some other instances, in which sand has been got, and stones have been got, (and there are a great many stones got in that beach,) to show that there have been applications to the lord of the manor for leave to do so.²

Mr. Courthope.—It has been truly said, that, until of late years the subject has been of very little importance for undoubtedly, till of late years all mankind might have taken this thing—but nobody hardly thought of taking it. Now, undoubtedly, it has become a great object.

Mr. Justice Bayley.—Great quantities have been taken away within the last twenty years, undoubtedly ; and if you look at many of the houses, and, I believe, at some of the streets in Brighton, they show that it has not been a *modern* practice only,—for an immense number of the houses in Brighton are built with the round stones which are thrown up by the sea.³

² These things are usually taken by the lowest and most ignorant of the people. The mere fact of such persons asking *leave* of the lord, or of his bailiff, may arise, and probably does in general arise, from their fear “of getting into trouble,” as was said by one of the poor “sand people,” in this very case. Such poor people will often ask leave for what they have a perfect right to do without leave; and rather than be prevented from earning a pittance to supply their immediate wants, will consent to pay to an interfering bailiff a modicum of their

earnings, and thus compromise the public right, as well as the title of the crown. This mere asking and giving leave, therefore, or paying for it, deserves, perhaps, not much weight where no “presentment and punishment of purprestures” exist, as evidence of regular jurisdiction, savouring of ownership.

³ This is perfectly correct,—the old town is principally built of stones taken from the beach ; the new portion of the town is principally of brick, or walls cased in brick or tile. Others are faced with the round “boulders,” no-

Mr. Courthope.—It is acknowledged that the right of the soil, where these stones lie, is the property of the lord of the manor.

Mr. Justice Bayley.—They are sometimes washed up *above* high-water mark, and sometimes they are not.

Mr. Courthope.—The greater part of them are *above* the high-water mark ;—the mass of these stones have, undoubtedly, been taken from time to time, *below* the high-water mark.⁴

Mr. Justice Best.—If they were taken from time to time without paying for them, I should think that would be very strong evidence against the lord.

Mr. Courthope.—That would be to show that all his majesty's subjects have a right in this soil.

Mr. Justice Bayley.—I do not think that it proves the right is not in the *crown* ; for, in general, the crown has the right,—not with a view to the private reservation to collect the stones for itself, or to collect the sand for itself, but *for the general interest of the public* ;⁵ and, if you can, without interfering with and prejudicing the interest of the public, remove the sand and the stones, the crown will not interfere. But if you do that which amounts to a *nuisance*, then you may be *indicted* for it ; or, if that which is done does not extend to an absolute nuisance, as if it is *purpresture*, the crown may remove it.

ticed by the learned judge. There is not a house or wall in Brighton which is not composed, more or less, of materials taken from the shore ; including sand, and fine and coarse gravel, or beach, for mortar, and the manufacture of bricks.

⁴ The "boulders," are almost always collected below high-water mark ; being the larger stones, they are not borne so far up as the common beach, by the ordinary action of the tides. No toll was ever taken for them on the Brighton shore.

⁵ In *Blundell v. Caterall*, the court seem to have been disposed to favour the vesting of the shore in the lords of manors, in order that the uses of the shore might be under "particular regulations;" but, from what is here said by the learned judge, it seems the court inclines to the ownership of the crown, and that the public are likely to be most benefitted, and sufficiently protected by such ownership. See p. 224, ante.

Mr. Courthope.—There have been grants.

Mr. Justice Bayley.—They are grants on that which is avowedly the property of the lord of the manor, *above* high-water mark.

Mr. Courthope.—In the grant to Williams he has gone beyond it.

Mr. Justice Bayley.—That is one instance, and a very modern instance that.⁶

Mr. Justice Holroyd.—There are only three instances of grants—1743, 1802, and one in 1813.

Mr. Walford.—And only one of them above high-water mark.

Mr. Justice Bayley.—Two above high-water mark.

Mr. Courthope.—My observation on that was merely to show, that the taking of stones would be very weak evidence to establish the right, where that which is unanswered is an important right, as that of dealing with the soil.

Mr. Justice Bayley.—Are there no acknowledgments paid to the lord of the manor for *carriages*⁷ which go from time to time down to the sea-shore?—Do the bathing-machines pay any rent to the lord of the manor?

Mr. Marryat.—No; it was proved that they did not.

Mr. Justice Bayley.—These are very strong things.

Mr. Courthope.—That would only go to show some prescriptive right of passage over it.

Mr. Justice Bayley.—All this is evidence for the jury. I do not say that the jury might not have found a verdict for you; but the question is, whether the verdict is so much against the weight of evidence as that we ought to grant a

⁶ See note to p. 274, ante of the Appendix.

⁷ See p. 203, ante, upon this topic. These machines are numerous, and, when ranged above high-water mark, take up a considerable space of ground. But the right to drive

in one of these, or any other vehicle, down to the shore, and into the sea, or by the usual approaches to the shore, has, in a former page, been contended for, with great deference, as of common right, not liable to toll of any kind.

trial, where the injury, which the defendant has done, is certainly of very comparatively trifling consideration.

Mr. Courthope.—The great object is, the setting of this question at rest.

Mr. Justice Bayley.—Then, if that is the real object, it may be tried at any other time, by any other person ;—the lord has been acquiescing in this for a century.

Mr. Courthope.—There is a subscription for trying the right.

Mr. Justice Bayley.—That is said by the defendant.

Mr. Bolland.—I will not trouble your lordships long on this, more than to call the attention of the court to this circumstance, which I think makes this subject differ from many others,—viz. that, with respect to these grants, one of which is very modern, undoubtedly ; but your lordships know the situation of this place : except the part where the baths are, there is no other part of the beach of Brighton that could be properly the subject of a grant, than the part between the east and west cliff. It would be idle to go beyond the jetty, or the eastern side of the bathing-machines, and to go on the *western* side, or the Shoreham side ; for if the lord was to make a grant to enable a man to build a house *there*, the sea is making such encroachments on that side, that, in all probability, it would take it away from him in a very short time. So that, the part where Mr. Williams's baths are, was the only part which could be serviceable to make a grant for the purpose of building. The encroachments of the sea on one side would make buildings out of the question.

Mr. Justice Bayley.—The sea gains on the east, and leaves on the west.⁸

Mr. Justice Best.—You might leave the lord of the manor and the sea to settle that question.

Mr. Justice Bayley.—Very likely Williams might be

⁸ This is the fact.

inclined to take that grant, for this reason,—he thought that by paying a small sum of money, he might have it in peace.

Mr. Bolland.—The crown would be naturally watchful of its own privileges; and if the lord had no right to make this grant, it is not very likely that the crown would have let it remain without inquiry. But there was also an *important* fact, and one which made a very great impression on the learned judge; it was this—that they formerly *scraped* the sand from the surface, not making any *large holes*.

Mr. Justice Bayley.—When the lord complained, (through the reeve), they were saucy;—therefore, if the lord of the manor was the person who had the right to control them, the reeve might have complained to the lord of the manor, who naturally, one would think, would have stopped them.¹

Mr. Bolland.—If we take the whole of the sea-shore, from one part of Great Britain to another, people no doubt do, in places which are unfrequented, not only take sand, but dig holes also, where the soil is in the lord, where there is a tacit permission to take the sand which the sea restores the next tide, without causing any complaint. But there was other evidence; for your lordships will find that it is reported by the learned judge, from the mouth of the witness, that there is a payment of mackarel, taken for all boats that land.

Mr. Justice Best.—That is capstan rent:—it is a very common thing.

Mr. Justice Bayley.—It was admitted to be capstan rent.

Mr. Bolland.—There was no evidence of its being so at the trial; nor is it necessary they should pay any rent for the use of the capstans.

¹ See note to p. 270, of the Appendix.

Mr. Justice Best.—I should be glad to know how, in point of law, you can support a prescription against fishermen, compelling them to pay a toll for what they have no advantage from. They pay this all over the coast.

Mr. Bolland.—It was shown that the fishing vessels never could land, for they were a large kind of boat; but the mackarel is landed in smaller boats: the larger ones stand off.

Mr. Justice Best.—You know the larger boats never could be got on shore without the capstans, though the smaller ones can. It is very important that there should be capstans, that large boats may be drawn up in safety on a gale coming on.³

Mr. Justice Bayley.—I have seen them drawn up a hundred times.

Mr. Bolland.—But, my lords, we say this verdict is erroneous, and that it should be corrected. Your lordships will see the finding of the jury will appear to be *sanctioned*, by its not going down to a new trial; so that, in the event of another action, it will operate to our prejudice in this way,—it will be thought the right has been established in this action.

Mr. Justice Bayley.—If this case is worth the expense of a new trial, and a fresh action is brought against any person who shall commit a similar trespass, the jury would be told by the judge who tried the cause,—that very little reliance was to be placed, to the prejudice of the lord, upon the verdict in question;—that it was only the inference of the jury drawn from the evidence *then* laid before them;—and if, before another jury, *other* evidence be laid, or even the same evidence, and such a statement made, which shall

³ See note to p. 211, ante. It did not appear, in this case, that any boat, small or large, paid for their safety, in being laid up, when not in use, above high-water mark. Yet the practice

not only here, but every where, is, and must be, to use the strand, bank, or *terra firma*, above high-water mark, for this purpose; and so far as is reasonably necessary.

induce the jury to come to a different conclusion, there is nothing to prevent them from so doing. It does not appear to me, that we are at liberty to say the verdict was wrong, or that the matter in dispute is of that value that we ought to grant a new trial. The law, as it seems to me, was very properly laid down by the learned judge at the trial; the right, up to the high-water mark, is in the lord of the manor of the adjoining land, as manorial. *Prima facie*, the lord of the manor is entitled up to high-water mark; but between high and low water-mark,—the *ordinary* high and low-water mark,—the right is *prima facie* in the crown; and the crown has, likewise, the right of wreck. The right of wreck, and the right of soil, being both in the crown, the crown may grant both the one and the other to one and the same individual;—or it may grant the soil without the right of wreck;—or it may grant the right of wreck, without granting the right of soil.³ And, in forming a judgment, whether in any particular spot, as in the boundary of any particular manor, whether there has been a grant to any, and what particular extent,—the proper thing is, *to look to the exercise, and see how the lord of the manor has from time to time acted*. The right of the crown is not, in general, for *any beneficial interest to the crown itself, but for securing to the public certain privileges in the spot between high and low-water mark*.⁴ And if any nuisance is committed on that spot, then the crown has the power of proceeding to rectify such nuisance. Now, in forming a judgment in this case, up to what extent there had been a grant by the crown to the lord of the manor, there is a great deal of evidence on the subject of wreck, and there would be no difficulty in saying,—if this were a question of the right of wreck,—that there is abundant proof that the crown had granted *this* right to

³ See accordingly p. 19 and 20, and see note to p. 283, of Appendix.

⁴ See accordingly p. 120. ante,

the lord of this manor. But "wreck" is not the only act of ownership which the lord may exercise, or which the person to whom the soil belongs may exercise. *There are many rights to be exercised on the spot between high and low-water mark*,—amongst others, that of getting sand is one, and sometimes also the power of getting stones is another,⁵ particularly that kind of stone, which, I believe, at Brighton, is called a "boulder." And then, if I show that, as far back as memory can go, the lord of the manor has constantly exercised the right of wreck; and, if I find *that is almost* the only right he has been in the habitual exercise of, and that other persons, from time to time, have exercised an opposing right, and to an extent which must have come to the knowledge of the lord, and exercised it with a degree of temper which shows they were standing on something like a right of their own,—a right in opposition to the lord,—I think *that* was a species of evidence which was very proper for the consideration of the jury, to enable them to judge to what extent the crown had granted the soil. Now, according to the testimony of the second witness, Carden—"Till lately, all mankind used to take sand, and when he has remonstrated with them on the subject, they have been saucy."—Why, that is the conduct of persons who think there is nobody on the spot who has the power to interfere, to prevent that which they are doing;—assuming, that, formerly, they did not dig *so much* as now, but they were in the habit of digging. Now, there is an instance in May, 1813, of a grant taken from the lord of the manor for the purpose of doing something between high and low-water mark; but that is one instance, and one instance only, and it was for the jury to form their judgment, what weight was to be placed on that instance;—the right would be either in the lord of the manor,

⁵ Query, if these are not one and the same, as matter of right, involving one another, under the word "soil?"

⁶ See note to p. 274, ante of Appendix; the object was for laying down pipes for public baths.

or in the crown. The crown might not know any thing of the grant;—or the crown might see what was doing was not a thing which interfered with public purposes, or with navigation, or with the rights of the public,—as far as the rights of the public were to be exercised for the benefit of the public, between high and low-water mark ; and, therefore, the crown would not interfere. Then, how is it to be known to any body else, except the lord of the manor ?—Then Murrell (the reeve) says, from time to time he has removed carts, and that complaints have been made to him respecting persons who have taken sand. And with reference to those holes :—those holes were, in many instances, *nuisances*, and might have subjected the parties, not to an action of trespass at the suit of the lord, but to a persecution on the part of the crown, for the injury they did to the general rights, which, in such places, the public might have thought were nuisances.⁷ With respect to the instances in which Murrell interfered, they are not specifically pointed out, nor are the places as to which he from time to time interfered. Whether he had a proper cause for his interference is not made clear. But all this was for the consideration of the jury, in opposition to the other evidence on the part of Carden. I cannot say that, looking to the whole of this case, there was such a preponderance in the weight of evidence on the part of the plaintiffs, as made it imperative on the jury to find a verdict for the plaintiffs; on the contrary, I think the weight of evidence, from the constant exercise of persons unconnected with the manor, without leave of the lord of the manor, in taking sand, from time to time, was strong evidence to warrant the jury in coming to the conclusion they have come to. It does not appear to me, in this case, that the right is of any great value [to the lord]; indeed, of so little value is the subject matter which is taken, that the lord for many, many years, never thought it of the least value at all, and

⁷ See pp. 213, 217, ante.

never thought it worth his while to interfere. For these reasons I think we ought not to grant a new trial.

Mr Justice Holroyd.—I think there is not sufficient ground, in this case, to say that the verdict was wrong—to authorize us to set it aside, and grant a new trial. It is true, Lord Hale instances *wreck* as *one* of the species of right, which *tends* to show a right to the soil. In one place, in his treatise “*De Jure Maris*,” he intimates, that if it were otherwise, the party could not get down to take the wreck.* I think it *may* be evidence of ownership, particularly if coupled with *other* acts of enjoyment of the right of soil. Where the crown grants the right of wreck, it is *probable* the crown grants the right of soil also; but if the crown grant the right of wreck alone, by *that grant the party would have a right to come and take the wreck, as incidental to the grant*, otherwise the grant of the right could not be a grant of any thing whatever. Every thing necessary for the enjoyment of a right, passes incidently with the grant. The jury may have considered this, not merely on the few acts of enjoyment which were proved to show this was a part of the rights of the lord, and not of the rights of the crown; but they may have proceeded as well on the evidence which was actually given, and the few acts of enjoyment on the part of the plaintiffs, as on what further evidence might have been expected to be given, if the right had been in the lord, and not in the crown. The circumstance of any persons who chose getting sand, and their manner of conducting themselves, evidently thinking they had a *right* to do it, is evidence to show, that the right was in the crown, and not in the lord of the manor, who may be presumed to have been present, and looking after his right, not personally, but by his reeve or bailiff, or some other person whose business it was to look after his property. If the right is in the crown, the crown is more likely not to be looking after

* See pp. 88, 89, ante.

this, which though it may have been beneficial to the public, yet it is a sort of property which the crown would be less likely to interfere with, and to take away the right from the subject, who is likely to derive a benefit from it. I think there was not such a weight of evidence as to authorise us to grant a new trial. This verdict will not be binding on the party, or have, probably, any such effect in a case having *further* evidence, (if further evidence can be given,) as to prevent the further evidence having its due weight, if it shall be thought right to agitate the question again. I think, therefore, this rule must be discharged.

Mr. Justice Best.—I do so entirely concur with what has been said by my learned brother, that I should not think it necessary to say a word, if it were not for some observations which have been made, at the bar, by counsel, and which, perhaps, might be misunderstood at Brighton, if they remained unnoticed. Let it not be understood, that because the lord has not sufficiently made out his right to the beach, that persons may, without subjecting themselves to punishment, dig holes so as greatly to endanger the lives of those who have occasion to land. There cannot be a doubt, that persons who dig holes of that kind, are liable to be indicted for a most dangerous nuisance: this cause has been tried by a special jury; a description of persons not likely to be unfriendly to the rights of the lord. They have thought that the lord has not satisfactorily made out his right to the spot in question. I entirely agree with them. By the common law, the right to the spot in question is in the king, and, therefore, *a lord must make a strong case*, and, if he pleases, he may produce a grant from the king, to show that the right, originally in the king, has been transferred to the lord. What Lord Hale says, is, that a party having one right is *some* evidence to show that he has another; but not that it is sufficient to show, by having the right of

wreck, that he is the owner of the soil. The case here is nothing like that which he puts: he should show that he has continually taken sand, and licensed others to do so;— is there any evidence of that kind in this cause? It appears that, in ancient times, whoever thought proper to carry away sand, did so. It appears that, in more modern times, the lord has interrupted the parties; but it does not appear that he has, in any other instance, either licensed others to exercise this right, or exercised it himself. I think this was an extremely weak case on the part of the lord of the manor; and, in my judgment, certainly not sufficiently strong to beat down the common-law right which exists in the king. It has been argued, that these acts were done by individuals, at Brighton, who gave no proof of right: if the right is in the king, it is not necessary they should have given that proof, because he has the common-law right. Is there any evidence to show that the common-law right has, or has not, been transferred to the lord? It is to be presumed, that, while the right is in the king, he would permit these things to be done, if they were not injurious to the navigation. For these reasons, I am of opinion, that we ought not to send this down to another trial.

Rule discharged.

REMARKS.

The foregoing case has decided, that a right to "wreck" will not *alone* confer a title, by presumption or construction of law, to the ownership of the soil of the "shore," against the crown. So far, therefore, the doctrine contended for in a former page, has been judicially supported. But

the learned judges did not explicitly state, what *other* additional or cumulative evidence might suffice to establish such ownership. The exclusive right to take sand is alluded to, as *one* badge of ownership; and we are also told, that "the proper thing is to look to the exercise, and see how the lord of the manor has, from time to time, acted." There can be no doubt but that this must be the general rule, if *presumption of law* be allowed, at all, to confer a title to the "shore." Still, however, this case does not enable us to determine, out of all the badges of ownership alluded to by Lord Hale, how many may, and how many may not, be dispensed with. Whether wreck and royal fish together will suffice? Whether wreck and an exclusive fishing, or an exclusive taking of sand, will suffice? Whether to these must be added jurisdiction of "purprestures?" or whether further acts of copyhold-grants, leasing and taking rent, embanking and in-taking from the sea, or some, or one of these must, also, be brought into the scale?

This case, however, furnishes a strong illustration of Bracton's doctrine regarding the *communis usus* of the sea-shore. For it appears that, in the shore of the manor of Brighton, between high and low-water mark, the public have, immemorially, exercised and enjoyed every useful privilege of which such shore seems capable. They have resorted to, and used it for the following purposes, viz. for the fisheries, for navigation, for free-way and passage, for bathing, for digging and taking sand, shell, stones, sea-weed, and other materials of the soil. And all this they have done, without restraint or hinderance from the crown or the lord of the manor. These rights do not appear to have been confined or limited to the *tenants* of the manor, or to the *inhabitants* of the town; but have apparently been exercised by all men who dwelt within convenient reach of the shore. The franchise of wreck,

or royal fish, could not be the subject of *common* use ; but, for all uses capable of *common* and general enjoyment, the whole shore seems to have been, immemorially, perfectly free and open.

If the manor of Brighton should be found to represent, in these respects, the prevailing practice in the *great majority* of the sea-coast manors of the kingdom, it would be difficult *à priori* to controvert Bracton's assertion, " that the sea-shores are, *jure communi*, as open to common resort, and common use, as the sea itself."¹ There are, no doubt, many exceptions grown up ; some by actual grant from the crown, and more by gradual encroachment ; but, with these exceptions, the general rule and presumption seems to be, that the crown has immemorially held its ownership of the shore, subject to these common uses, in like manner as its dominion over the seas is open to the common use of all the subjects of the realm. It must be acknowledged, however, that such does not seem to be the prevailing doctrine of recent authorities, as regards the sea-shore. Yet the learned Judge, in the foregoing case, declared, that " the right of the crown is not, in general, for any beneficial interest to the crown itself, but for securing to the public certain privileges in the spot between high and low-water mark." And if this be so, it might, perhaps, be conceded, that all those common uses of the shore which have been immemorially acquiesced in by the crown, and enjoyed by the public, are, by this time, established of common right, in the same manner as the public fisheries have been enjoyed and established. Nothing more is wanted for the public than those common uses of the shore, which, as it seems, have been immemorially enjoyed in the shore of the manor of Brighton.

It is a question of some interest and importance, how far the present state of the law, upon the subject of the fore-

¹ P. 117, ante.

going pages, is susceptible of alteration and amendment. Possibly it may form one of the topics for the consideration of those to whom the reform of the "laws of real property" has been entrusted. The crown, on behalf of the public, has an interest in the shores of every sea-coast-manor within its dominions; and the public are still more directly and continually concerned in the clearness and certainty of this portion of our law. The only parties who profit by its existing uncertainty, are the lords of manors themselves, whose individual interests are, for the most part, opposed alike to the crown and to the public. The prevailing mode of making title to the sea-shore, by *prescription* and *presumption of law*, has a tendency to favour "intrusions" and "encroachments" upon the ownership of the crown, and the rights and privileges of the subject. It may be a question, whether it ought ever to have been in the power of the crown to alienate, by grants to individuals, any portions of the sea-shores of the realm; and it may be still more questionable, whether such alienation ought ever to have been *presumed* by a court of law, when no grant whatever could be produced. It may be thought, that prescription, or presumption of law, ought, in no case, to be allowed to prevail against the title of the crown to so important a trust, confided, by the law, to its charge, for the good of the commonwealth. If the King were to make the sea-shores of the realm a source of private sale and profit, he would, according to what is said before by the Judges, be acting contrary to the trust for which the ownership of the shore was vested in the crown by the common law. Still less, therefore, ought private individuals to be aided by presumption of law, in their claims upon the shore, when the crown and public are both thereby greatly impoverished. "Our common law of England," says Callis, "doth much surpass in reason, either the imperial or civil law; for, by our law, it is said, *Rex habet proprietatem*,

sed Populus habet usum ibidem necessarium." In the manor of Brighton, this doctrine seems to have been fully exemplified, and it may be doubted whether every judicial decision, which has diminished this *proprietaem* of the crown, and narrowed this *usum necessarium* of the public, has not been a departure alike from the reason and the principles of the common law.

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